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United States Senate

SENATE IMPEACHMENT
TRIAL COMMITTEE

WASHINGTON, DC 20510-6326

Hearing on Pretrial Issues Presented by the Parties in
the Impeachment Of Judge G. Thomas Porteous, Jr.
Wednesday, August 4, 2010
SR-301, Russell Senate Office Building

AGENDA

HOUSE MANAGERS:

Representative Adam B. Schiff (D-CA)
Representative Bob Goodlatte (R-VA)
Representative Zoe Lofgren (D-CA)
Representative Henry C. "Hank" Johnson (D-GA)
Representative F. James Sensenbrenner, Jr. (R-WI)

HOUSE IMPEACHMENT COUNSEL:

Alan Baron, Chief Special Impeachment Counsel
Mark Dubester, Special Impeachment Counsel
Harold Damelin, Special Impeachment Counsel

RESPONDENT:

Judge G. Thomas Porteous, Jr.

RESPONDENT'S COUNSEL

Jonathan Turley, Esq.
P.J. Meltl, Esq.
Dan O'Connor, Esq.
Dan Schwartz, Esq.

OPEN SESSION: 1:00 p.m. to 3:00 p.m.

Argument by the Parties: 2 hours
Questions from Committee Members

CLOSED SESSION

At the conclusion of the questioning of the parties by Committee Members, the Senate Impeachment Trial Committee will go into closed session and deliberate these matters.

ISSUES TO BE ARGUED

1. Judge Porteous's Motion to Dismiss the Articles of Impeachment as Unconstitutionally Aggregated; or, in the Alternative, to Require Voting on Specific Allegations of Impeachable Conduct
 - a. House's Consolidated Opposition, Argument V: The Articles of Impeachment do not impermissibly Aggregate discrete allegations

2. Cross Motions on the Admission of Prior Testimony and Transcripts
 - a. House as the principal movant:
 - i. House Motion to Admit Transcripts and Records from Prior Judicial and Congressional Proceedings
 - ii. House's Opposition to Porteous's Motion to Exclude Prior Testimony and Limit the Presentation of Testimonial Evidence to Live Witnesses
 - b. Judge Porteous as the principal movant:
 - i. Judge Porteous's Motion to Exclude Prior Testimony and Limit the Presentation of Testimonial Evidence to Live Witnesses
 - ii. Judge Porteous's Opposition to House Motion to Admit Transcripts and Records from Prior Judicial and Congressional Proceedings

3. Cross Motions on the Admission of Judge Porteous's Immunized Testimony before the Fifth Circuit Special Committee
 - a. House as the principal movant:
 - i. House's Notice of Intent to Introduce at Trial Judge Porteous's Testimony Before the Fifth Circuit Special Committee
 - ii. House's Opposition to Judge Porteous's Motion to Exclude the Use of his Previously Immunized Testimony
 - b. Judge Porteous as the principal movant:
 - i. Judge Porteous's Motion to Exclude the Use of his Previously Immunized Testimony
 - ii. Judge Porteous's Opposition to House's Notice of Intent to Introduce at Trial Judge Porteous's Testimony Before the Fifth Circuit Special Committee

TRANSCRIPT OF PROCEEDINGS

UNITED STATES SENATE

- - -

IMPEACHMENT TRIAL COMMITTEE

- - -

IMPEACHMENT OF JUDGE G. THOMAS PORTEOUS, JR.

PRE-TRIAL MOTIONS ARGUMENTS

- - -

O-P-E-N H-E-A-R-I-N-G

Washington, D.C.

August 4, 2010

IMPEACHMENT OF JUDGE G. THOMAS PORTEOUS, JR.

PRE-TRIAL MOTIONS ARGUMENTS

- - -

WEDNESDAY, AUGUST 4, 2010

United States Senate,

Impeachment Trial Committee

On the Articles Against

Judge G. Thomas Porteous, Jr.

Washington, D.C.

The pre-trial motions hearing convened at 1:17 p.m., in Room 301, Russell Senate Office Building, before the Impeachment Trial Committee, the Hon. Claire McCaskill, Chairman; Senator Orrin Hatch, Vice Chairman; Senator Amy Klobuchar, member; Senator Jim DeMint, member; Senator Sheldon Whitehouse, member; Senator John Barrasso, member; Senator Tom Udall, member; Senator Roger F. Wicker, member; Senator Jeanne Shaheen, member; Senator Mike Johanns, member; Senator Edward E. Kaufman, member; and Senator James Risch, member.

Congressman Adam Schiff, Impeachment Task Force; Congressman Bob Goodlatte, Impeachment Task Force; Congressman Henry C. "Hank" Johnson, Impeachment Task Force; Congressman F. James Sensenbrenner, Jr., Impeachment Task Force;

Alan Baron, Chief Special Impeachment Counsel;
Mark Dubester, Special Impeachment Counsel;
Harold Damelin, Special Impeachment Counsel;
Kirsten Konar; counsel for the House; Jonathan
Turley, counsel for Judge Porteous; Dan O'Connor,
counsel for Judge Porteous; P.J. Meitl, counsel
for Judge Porteous.

Staff Attendance: Derron Parks, Staff Director;
Tom Jipping, Staff Director; Justin Kim, Counsel;
Rebecca Seidel, Counsel; Erin Johnson, Prof. Staff
Member/Chief Clerk; Lake Dishman, Prof. Staff
Member; Morgan Frankel, Senate Legal Counsel;
Pat Bryan, Senate Legal Counsel; Susan Smelcer,
Congressional Research Service.

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SENATOR McCASKILL: Good afternoon. I will now call this meeting of Senate Impeachment Trial Committee on the articles against Judge G. Thomas Porteous. The purpose of this meeting is to hear oral arguments on some of the pretrial motions filed by the parties -- excuse me.

As the parties are aware, the committee reserves hearing some of the motions filed because in our judgment the committee could not properly consider the motions without hearing the facts that will be presented at the evidentiary hearing in September.

So we will not make any rulings on those motions until we have had factual presentations that are necessary in order to make decisions on those motions. The parties have been informed that this motion's hearing will not follow the normal congressional hearing format. It will be more akin to oral argument before an appellate court.

Each party will have up to 20 minutes to present their case on each of the three issues listed -- issue areas listed on the agenda. During those 20 minutes, members of the committee may interrupt the parties to ask questions. We hope this will provide for a free-flowing and full

discussion of the issues that have been raised by the parties today.

Judge Porteous is the moving party for the first motion we will consider, and the House of Representatives is the movant on the final two motions. The moving party may reserve some of their 20 minutes of argument for rebuttal.

Counsel, please inform us, if you wish to do so, on how much time you wish to reserve before you begin your argument.

As a preliminary matter, the committee received a motion from two former members of Judge Porteous' defense team, Rennie Sterns and Samuel Dalton. They moved that the committee allow them to withdraw from the case for the same conflict of interest reasons for which Judge Porteous' former lead counsel was disqualified. We hereby grant their motion to withdraw.

With that, unless one of my colleagues wishes to add anything before we begin, we will now hear arguments on the first motion.

Mr. Turley, would you like to reserve any time for rebuttal?

MR. TURLEY: Yes, we would, indeed, like to reserve five minutes on rebuttal.

ORAL ARGUMENT OF JONATHAN TURLEY
ON BEHALF OF JUDGE G. THOMAS PORTEOUS, JR.

Good afternoon, Chairman McCaskill, Vice-Chair Senator Hatch, members of the Impeachment Trial Committee. My name is Jonathan Turley. I am the Shapiro Professor of Public Interest Law at George Washington University, and I am counsel for Judge Porteous, a judge on the United States District Court, for the Eastern District of Louisiana.

The motions today address the unique role that the Senate has in the constitutional impeachment process. This is a process that has only been used 14 times in the history of this Republic, but only seven removals of judges. It is a process that has a very long history that goes back to the beginning of the Republic.

In that process the United States Senate has a unique role, not just in determining whether a judge will be removed, but the conditions under which a judge will be removed. In essence, the Senate is the gatekeeper in terms of the procedures and the protections afforded to not just the constitutional process, but the accused.

Today, in this first motion, we are

dealing with a tactic called aggregation. For those of us who write in this field, this is well known; for those who are not in the field, it may be less so, but aggregation has always been controversial. It is sometimes called omnibus articles. And what happens is that you will occasionally see, in the history of impeachments, the House produced very specific articles -- the way, quite frankly, it should be done -- allowing the Senate to vote on whether an act occurred and whether that act should be the basis for removal.

On a few occasions, we have seen an omnibus article added to that list. That's an article that makes reference to multiple acts. Now those have been very controversial. The Ritter case, particularly, was controversial.

What is different in this impeachment is that the House has aggregated all of the articles. That is while, if you look at impeachments, like that of former Judge Hastings, you had 17 articles with very specific acts, and so the Senate was able to look at this after that, and determine if that occurred and whether it could be grounds for removal.

Indeed, of those 17 articles with

Hastings, 14 were specific false statements, often on the same subject, but they were separated out correctly, mind you, by the House, so that the Senate could determine if 2/3 of the members agreed with that article, so there was a clear record that the Constitution demands.

The Constitution demands that the record show not simply that you find that this is removable conduct that did in fact occur, but that 2/3 of you find such an act occurred.

What we have here are four articles with multiple allegations, and we have suggested that they are constitutionally defective, but we also understand that this body does not control the House, and that, historically, the Senate has felt an obligation to hear these articles.

So we have suggested an alternative, and that alternative is to say, when faced with an aggregated article, the Senate will do preliminary votes on those allegations, leading to the final vote of the article. I don't think anyone disagrees that you have that authority; but the point of this is that the Senate could do, frankly, a great deal of good, in terms of our constitutional process, by telling the House, if you are going to aggregate

articles, you must understand we are going to do our duty, we are going to vote on each of those allegations.

After all, if members of this committee were facing these type of allegations they would demand nothing less. They would demand the right to be able to get a vote on what people said that they have done and whether those acts constitute a removable offense.

This issue has a long record of Senators objecting to aggregated articles. The well-known Senator George Sutherland from Utah was very vocal about this --

SENATOR KLOBUCHAR: Madam Chair? May I ask a question?

SENATOR McCASKILL: The Senators are free to interrupt and ask questions at any moment during the presentation.

SENATOR KLOBUCHAR: In the case of Judge Walter Nixon, didn't the committee find, in that case, that the House has substantial discretion in determining how to aggregate acts of misconduct in framing the articles of impeachment, and that the committees, while these types of proceedings are rare, that the committees have historically chosen

to aggregate multiple factual allegations in one single impeachment article?

MR. TURLEY: Senator, you are absolutely correct, that the Senate has previously said, the Senate doesn't control the house, the House has the authority to write the articles any way they want. This has been controversial with Senators who have objected in the past, but they accepted the articles as what they are. What is different here, Senator, is we now have an aggregation of all the articles.

That is, we have finally reached a sort of nightmare scenario where instead of having one omnibus article at the end we have every article with multiple claims. The reason, Senator, this is particularly bad in this case is that Judge Porteous, unlike most modern impeachment candidates, has never had a criminal trial. And so this would be the first time he will have a full adversarial process to challenge the allegations.

But more importantly, our first access to these witnesses occurred this week. On Monday, we were given four depositions of only three hours each. Of those, we got about two and a half hours to question the witnesses. In that very short time, the witnesses directly contradicted a number of the

acts claimed in the articles. It was the first time they were actively examined, and not surprisingly, they openly contradicted statements including acts that were attributed to their own testimony.

That makes the aggregation all the more difficult because what we will be presenting to you in the Senate is we are going to present the House's --

SENATOR MCCASKILL: Excuse me, let me interrupt you for a second. When you said Monday was the first action that you had to those witnesses, isn't it true that Judge Porteous had an opportunity to cross examine all those witnesses, both in the Fifth Circuit and in and the House proceedings?

MR. TURLEY: Senator, it was true that he was given ten minutes in the House proceedings in order to cross-examine the witnesses.

SENATOR MCCASKILL: And didn't they also have an opportunity in the Fifth Circuit?

MR. TURLEY: In the Fifth Circuit, he was representing himself. The Fifth Circuit would not delay the proceeding when his attorney quit, and what we've point out is that also in the Fifth Circuit, it's very limited opportunity to

cross-examine, and the Marcottes, one of the key players with the allegations, were not even part that proceeding. So one of the things that we are saying is that this is the first full adversarial opportunity, and if you look at transcripts from Monday, you will see the result.

It's a testament to the adversarial process that when we specifically asked these witnesses, "this is what the House Report said you said," and they disagreed.

We asked people like Creely. We said, you know, the House Report says that you directly linked your loans or payments to the judge when you loaned him money to curatorships. He said that is absolutely not true. He said there was no relationship at all to curatorships.

SENATOR McCASKILL: Let's not get off on arguing the facts of the case here. I just want to establish what kind of opportunity your client has had for confrontation, cross-examination and the ability to discover what the witnesses will say. And it's my understanding that your client asked to extend time for examination in the House and was granted that extension.

MR. TURLEY: Yes, you are right, Madam

Chair, but if you look at amount of time he was given it was very, very limited. We are talking about the House that has interviewed dozens and dozens of witnesses. The judge was given very limited, roughly around 10 minutes a witness, with slight extensions for witness. I don't think any attorney would argue that that is a full adversarial opportunity.

But more importantly, if you look at depositions we did Monday, you will see what an adversarial deposition looks like and you will see the result. They contradict. And I am not actually arguing the facts here. The reason this is linked is because it is to try to convey to the Senate that aggregation itself has long been controversial, but in this particular case, it creates a very dangerous thing, because we are going to be showing you how critical facts that are alleged in the articles did not occur.

We have already laid out how one of the acts that they suggested --

SENATOR WHITEHOUSE: Counsel, let me interrupt for just a second.

This is not a judicial trial, we are agreed on that. If this were a judicial trial, and

the counts at issue were framed in such a way that multiple instances of conduct were included in a single count, and an appellate judge was looking at that and could say well, you know what, I can't tell whether the jury actually agreed on any particular charge, because they were combined in a single count, that would be grounds for potentially overturning the jury's determination or the trial judge's determination if it were before a trial judge.

Is that doctrine pertinent here, and are we, do you believe, under the same strictures as a judicial officer? Or does the impeachment process that we are involved in allow us to make an aggregated determination, simply because it's different from a judicial process?

SENATOR HATCH: If Senator would yield, if I may could just add to that, rule 23 of our impeachment committee rules states that, an article, quote, "shall not be divisible for the purpose of voting thereon at any time during the trial." That does seem pretty clear to me.

But that is, it seems to me, what you are asking us to do. Maybe I've got that wrong. But you know, on what basis are you asking us to ignore

our own rules? And let me just add this: is it your position that an article of impeachment may never allege more than a single individual act?

MR. TURLEY: I will take the questions in the order they were given, sir.

SENATOR WHITEHOUSE: Appreciate that.

MR. TURLEY: First of all, Senator Whitehouse, I do believe that the rules that govern criminal trials are applicable. Both the Chair and Vice-Chair have stated previously, have alluded to the constitutional protections and rules that the Senate tries to follow; but more importantly, in the past, there has often been references to court proceedings and what is allowed and what is not allowed.

Is this a criminal proceeding? No, it's not, but the Senate has always crafted the rules to try to achieve the same fairness. After all, the United States Senate is holding a trial, and they historically have tried to guarantee the same fairness and rights accorded to the accused. And this is a very important one.

And your second question, Senator Whitehouse was, in a real court of law, would this be allowed? The answer is no.

I am a criminal defense attorney and I would move to quash this indictment. It is unintelligible. And I don't think many Federal judges would let it go to trial. They would quash the indictment and say you have to allege specific acts. This is basically somebody is saying, you know, he did bad things. I mean it's very hard to even for us to figure out what the House is specifically alleging.

Vice-Chair Hatch, in answer to your question, I do not believe it violates the rule. First of all, this committee has the authority to set up preliminary votes. It's not dividing the articles of impeachment, because the last vote is a unified vote.

All we are suggesting is for the members themselves to know whether there are 2/3 of this body that agree that some of these acts occurred. Under the aggregation system, what can happen is that you can have less than 2/3 on any given claim and remove a Federal judge.

And more importantly, the public, let alone the accused, would never know what it was that he was accused of doing. You have to remember that the judge here is accused not of kickbacks and not

of bribery; he is accused of appearance of impropriety, of things like lunches. There are Federal judges that would probably like to know whether some of the things in these articles as viewed by the Senate is a removable offense, because some of them are pretty low standards.

I have gone over the time answering the questions and so I should sit down, I suppose, now and reserve the five minutes rebuttal. Thank you.

SENATOR McCASKILL: Thank you, Counselor. And we will hear from the House managers now.

ORAL ARGUMENT OF CONGRESSMAN SCHIFF

ON BEHALF OF THE UNITED STATES

HOUSE OF REPRESENTATIVES

CONGRESSMAN SCHIFF: Madam Chair, Senators, Adam Schiff appearing on behalf of the House. The motion in this case should be denied for one among many reasons. The first is the Senate has never dismissed an article returned by the House prior to the trial, for any reason. Let alone --

SENATOR WHITEHOUSE: Let me jump into my question --

CONGRESSMAN SCHIFF: Yes.

SENATOR WHITEHOUSE: Which I think it, at least from my perspective, seems to be the critical

one here. If there are multiple factual allegations in each of the charges, how could anybody assess that we had actually agreed by a 2/3 majority that any one of them had been committed and merited impeachment?

What if I felt that this section of the complaint had been; Senator Udall felt a different section had been, and didn't believe that what I thought had happened I did; Senator Klobuchar took a different point; and none of us on any particular point amounted to the majority the Constitution required?

How would you defend against that? Why isn't the unified verdict issue germane here?

CONGRESSMAN SCHIFF: Senator, for the reason that this is not like a civil case or even a criminal case, because you are both judge and jury in this case. You don't need to divide the question or instruct yourselves how you should deliberate.

When the trial is over and you go back to deliberate on the evidence, you can have that discussion internally. Do we all agree on what took place? Do we all agree on essential acts? Have they been proved in this article? Have the acts that have been proved, if not all have been proved,

have the facts that have been proved, do they rise to the standard of impeachable conduct? Are we all in agreement on that?

SENATOR WHITEHOUSE: So, in effect, you are saying we could cure it if we made clear in our verdict or in the statements surrounding it that we had drilled down to specific acts and had agreed that the relevant majority was commanded?

CONGRESSMAN SCHIFF: Absolutely. I mean, that is in the discretion of the Senate, both in terms of how you deliberate and in terms of what you say publicly after you've returned your decision. And in fact in many impeachment cases Senators have gone on record to explain why they made the decision that they did.

But to adopt artificially pretrial, and instruction to yourselves that you must break down an article into pieces, I think would be certainly a very new precedent and I think not a helpful precedent.

But I think it's important not to consider this argument in the abstract, and that is we are not really talking about omnibus articles here. The House did consider an omnibus article in this case. Omnibus articles in terms of the Senate precedent,

and House precedent, are when you have several articles, each on separate allegations, and then you have the last article which is omnibus in the sense that it combines allegations from the prior articles. We don't do that here. We considered doing that; we decided not to bring an article -- an omnibus article.

So the cases where the Senate has in the past considered, is there too many allegations within an omnibus article, are very different facts than here.

If you look at Archibald, for example, you can argue, if you accept counsel's definition of omnibus, that every single article in Archibald was omnibus, because some of them were multiple paragraphs long alleging several acts. This gets to Senator Hatch's question. Does counsel's argument mean you can never charge a scheme, that you could never set out facts of a conspiracy?

This is not a criminal case, so unlike what counsel argues, we do not have to charge the elements of a crime. What we do have to lay out is conduct that rises to the level of impeachment, of high crime or misdemeanor, which we have done.

But let's look at the specific articles

and what counsel is suggesting here. Just if you take the first article, which that sets out this scheme where the judge had this relationship with attorneys that were giving him cash for many years, and gave him cash while he was sitting on a case in Federal court, a case in which he failed to recuse himself; counsel would say, well, that's multiple allegations, that's omnibus. They think that ought to be four separate counts, is what they set out in the brief.

They think that, for example, it should be charged that, in one count that Porteous improperly denied a recusal motion in this case. That second when he decided the motion he failed to disclose his relationship with these attorneys. That in a third article it should say he made misleading statements during the hearing, and in a fourth article that he continued receiving cash from these same attorneys.

You would think on the basis of the pleading we were talking about four different cases, four different recusal motions, four different sets of attorneys. We are talking about the same attorneys, the same cash, the same relationship.

Now I have no question that had the House decided, with its constitutional responsibility, to

try it as four different articles, counsel would be before you today suggesting we improperly disaggregated a single scheme to make it seem like the conduct engaged in was worse, because we charged it multiple different ways.

So we are going to get this argument either way, but all the precedent says that the House has the discretion how to charge, and it will be up to the Senate after the trial, when you confer, do you all agree on the essential conduct of each article, and does that essential conduct rise to the level of a high crime and misdemeanor?

And I think trying to get into the factual argument, I take strong issue, and I don't want it to go unmolested here. I take strong issue with the claim that the witnesses who were interviewed or deposed this week have contradicted their statements in the House. That's not our view of their testimony at all. But that's a factual matter that you will resolve during trial, and it bears little value in terms of whether this body ought to dismiss a count and break years of Senate precedent.

SENATOR WHITEHOUSE: All right, well -- go ahead.

SENATOR KLOBUCHAR: Representative Schiff,

I appreciate your answer. That's why I went immediately to precedent. I think you've got a bunch of former prosecutors up here and it's easy to go over to the criminal proceedings that we are used to, but this is impeachment proceedings and the precedent there is important.

I wondered if you wanted to take the opportunity to respond to Mr. Turley's argument that his client didn't have adequate opportunity to confront some of the witnesses.

CONGRESSMAN SCHIFF: Well, certainly the main witnesses that we are talking about, that will be the central witnesses during the trial, they not only had several hours of cross-examination during the depositions this week, they had the opportunity to cross-examine them during the House proceedings.

Members were given five minutes to ask questions. Judge Porteous' counsel was given ten minutes to ask questions. Each and every time Judge Porteous' counsel was asked for more time, he was granted more time to ask questions. Some of the witnesses, they didn't even ask questions of. So to the extent that some witnesses were not cross-examined, it was because Judge Porteous' own council decided there was no cross-examination

necessary. Judge Porteous had the opportunity in the Fifth Circuit to cross-examine these witness.

It's very difficult to argue, and I think this is really the relevance here, it's very difficult to argue after the multiple years of the Fifth Circuit, of the House proceedings, that Judge Porteous is somehow unaware of what the allegations are here. He is intimately aware of the allegations.

And so the policy question here is, is the judge on adequate notice of what he is charged with? Is the rest of the bench, if you return verdicts of guilty, going to know conduct that you have decided is beyond the pale? And I think when you read the articles and given the long history of this case, it's clear the judge knows what he is charged with, and I think the articles make plain to the rest of the bench and the public the conduct which the House views is incompatible with the public trust.

SENATOR WHITEHOUSE: All right. Well, let's look at article 1 which suggests three sort of courses of conduct. The first is that while presiding as United States District judge he engaged in a cross game and details surrounding that. And second is that he also made intentionally misleading

statements at the recusal hearing, which deprived the parties and public of the right to the honest services of his office; and third, you say he also engaged in corrupt conduct after the Lifemark v. Liljeberg bench trial.

Let's go back and say that Senator Udall believes that he did engage in a corrupt scheme while presiding, but neither Senator Klobuchar nor I do. I believe that he intentionally misled the court at the recusal hearing and deprived the parties of the right to honest services of office, but neither Senator Udall nor Senator Klobuchar do. And Senator Klobuchar believes that he engaged in corrupt conduct after the trial as alleged.

None of us agree on which wrongful conduct he committed, and yet we could all agree that he did something wrong. Is that not a problem? Is there not sort of a duplicative charge/unified verdict problem here? I still don't see how you prove that if you have the votes here if we haven't agreed on what the underlying conduct is.

CONGRESSMAN SCHIFF: Senator, two points. The first is that part of the reason why the Senate has never dismissed a count before trial is because the trial will clarify the issues you are talking

about. It is highly inconceivable, I think, on the facts of this case that you would decide -- some of you would decide that he improperly denied the recusal motion, but also find that he had no relationship with these attorneys where he got cash from them. The very reason why the recusal was improper denied is because he had received cash from these attorneys.

So when you look at the facts of the case, it is very unlikely that you are going to have -- you are going agree on one of those and not the other. Now Let's say you did.

SENATOR WICKER: If that's the case, how is your side of the argument harmed by that? The the judge and his counsel are asking that in the alternative each allegation be voted on individually. How are you harmed by that?

CONGRESSMAN SCHIFF: Well, Senator, if that is the decision that the Senate makes after hearing the evidence, the Senate has every opportunity to do that. The Senate can when it deliberates say, we want to have a separate vote internally on each of the facts that are alleged in article 1, or each of the facts that are alleged in article 2. You can make that decision, and if the

vote internally is such that you don't agree, and you have a further discussion and say, well, unless we all agree on these pieces, we don't think the conduct rises, you can make that decision.

But to try to do that in advance, to try to do that without the benefit of hearing the evidence I think is a disservice to the Senate. You don't have to instruct yourselves prior to the trial about how you wish to deliberate in this case, but you will have every opportunity when the evidence is provided to you to vote on it in any way, shape or form that you so decide. Nothing that we do here will prejudice that.

SENATOR HATCH: Could I interrupt you for a second? Our impeachment precedents are very important to us. As I recall, in 1936, the impeachment of Judge Halsted Ritter, the Senate acquitted him on six individual articles of impeachment, but convicted him on an article that combined three allegations of all of the others. Now why is this not a solid precedent for the proposition that the Senate can convict on an article that includes multiple allegations?

CONGRESSMAN SCHIFF: Senator, it is. And the very precise issue raised in that case has been

raised in several other impeachment cases as well, where counsel has taken issue as here, that there are more than one facts alleged in a single article. In each and every time the Senate has had that argument, the Senate has rejected it.

SENATOR HATCH: Okay. Now, the most recent impeachment precedent involves Judge Walter Nixon. In 1989, he moved to dismiss one of the articles against him because it aggregated multiple allegations. Now that sounds like the argument that Judge Porteous is making today, to me. The Nixon impeachment committee denied the motion citing the House's discretion and claiming the articles of impeachment. Why is that not sufficient precedent for us today? Or is that sufficient precedent for us today?

CONGRESSMAN SCHIFF: Senator, I think it is exactly on point. In the case of Judge Archibald, he was charged in an omnibus account that summarized several of the other articles, not just conduct within that article, but several other articles. He was convicted on that article. In the case of Judge Ritter he was also charged with an omnibus article, and in fact was acquitted on the non-omnibus articles, and convicted only on the

omnibus article. In the Nixon case as you point out, similarly, omnibus article charged and motions to dismiss those articles denied.

So there is not a single time, not a single Senate precedent really supports the proposition that Judge Porteous makes here. If this committee decides to guide by its precedent, that precedent is very clear on this point.

SENATOR McCASKILL: So Counsel, the essence of your argument is that the purpose of the articles of impeachment is to adequately notify the judge of those matters that the Senate would be considering in trial deliberation and decision, and that these articles sufficiently lay out the conduct that we would be hearing factual evidence on and making decisions in regards to.

And that as to the individual articles, the Senate has the ability, and in fact, I would think it would be imperative, that the Senate look at the various charges of conduct contained in the articles, deliberate all of them, and make a decision that was very clear, that they agreed that there was at least one allegation of conduct that rose to the level that required a verdict or removal from the bench. Is that, essentially, the argument you are making

today?

CONGRESSMAN SCHIFF: Senator, that is exactly it. And the only additional point would be that every time this issue has come up in prior impeachments, that is exactly what the Senate has decided to do.

SENATOR KLOBUCHAR: And you also would say, then, to go one step further, when looking at these individual charges that are in each of these articles, we could decide on our own to individually vote on each one or vote on them as a group, and we would be allowed to do that; because this is not like a jury in a criminal case. The Senate has made decisions on its own in the past.

CONGRESSMAN SCHIFF: That's exactly right, Senator. And getting back to the Senator's point and Senator Whitehouse's point, let's say on article 1, the Senate decides this judge took cash from a lawyer while a case involving that lawyer was under submission. I don't care about anything else this article says, he should be removed on the bench for that alone. Are we all in agreement on this? And as Senators, you would agree, not only was that proved, but that fact alone justifies his removal. That's it.

Do you need to go and decide whether each of the other points in the article has been shown? I don't think you do. You can decide that conduct alone.

It's similar to, if you will -- and I analogize it to criminal cases -- it's not necessary that each fact alleged in an indictment be proved by the prosecution. It's only necessary that the elements of the crime be proved. And the crime here is conduct that belies the public trust, that rises to the level of high crime or misdemeanor. If you find that to be true in one allegation of a count, that is all you need to find.

SENATOR WICKER: In that instance would we state it on the record and make it clear in our report to the full Senate?

CONGRESSMAN SCHIFF: Senator, that will be your decision.

SENATOR WICKER: Should we?

CONGRESSMAN SCHIFF: I think it's worthwhile, frankly to shed light on however you reach your conclusions in the interests of future cases. And counsel says you can do something positive here in terms of the historic record. I think whenever Senators express the reasons how they

reached their decision, why they reached a decision, it is not only instructive for the public, it's instructive for the House in terms of future impeachment proceedings.

And we looked at the record of some of the prior impeachment proceedings on issues we will get into later about prior conduct, to what degree can you consider prior conduct. And in some of those cases, you have six Senators saying one thing and six Senators saying nothing or another thing, and the vast majority saying nothing.

Now that provides some indication; of course, it's more helpful when all the Senators speak with the same voice, but I think it would be advantageous to have Senators --

SENATOR McCASKILL: That would be highly unlikely.

(Laughter.)

CONGRESSMAN SCHIFF: I realize that, Madam Chair.

SENATOR HATCH: That also raises the problem that, if Senators agree that the same act is an impeachable act, but each applies a different standard of proof, is that okay?

CONGRESSMAN SCHIFF: Well, you know, I

think it is, Senator, perfectly appropriate, for each Senator, if they choose to, to explain why they reached the verdict that they did. It's not that the standard of proof is different. Ultimately I think all Senators are going to agree that the standard is high crimes and misdemeanors. How they reach their determination, though, is an individual decision for each Senator and I don't think it poses a problem for Senators, if they choose, to describe how they reached that conclusion.

SENATOR McCASKILL: Okay. Any other questions?

SENATOR WHITEHOUSE: Are you conceding that it is required that the Senate make clear that the constitutionally required majority has indeed agreed on a particular allegation within the larger count?

CONGRESSMAN SCHIFF: No, Senator, I think it is up to the Senate how it wishes to describe the verdict it has reached. It will be part of your deliberation. And if the Senate wishes to go on record and specify very particularly what it has found, the Senate can do that. If the Senate wishes to say that the conduct charged in article 1 and proven by the House is so undermining of the public

trust, this person cannot continue to serve on the bench, and it doesn't wish to go beyond that in its public pronouncement on it, the Senate has every right to do that. So that will be a decision the Senate will have to make.

SENATOR McCASKILL: Anyone else? Thank you, Congressman Schiff.

CONGRESSMAN SCHIFF: Thank you.

SENATOR McCASKILL: Mr. Turley, you actually have two minutes remaining on the first portion of your argument, so you have seven minutes remaining that you can argue your motions.

REBUTTAL ARGUMENT OF JONATHAN TURLEY

ON BEHALF OF JUDGE G. THOMAS PORTEOUS, JR.

MR. TURLEY: Thank you very much. First of all, I want to say I have tremendous respect for Mr. Schiff, and I respect his statement that he does think it's good for the Senate to explain its reasons. My disagreement with him is on the edges of that statement, in fact what Senator Whitehouse raised.

It is not my view that the sole purpose of an article is to put an accused person on notice. I don't know where that comes from, but it definitely does not come from the history of impeachment. The

purpose of an article is to inform the public of what a judge has been accused of. The way the Framers designed this was to have an exacting process with high standards, because they do not want there to be any doubt of other judges of what it would -- what it would take to get you removed from the bench; so they set an exacting requirement, a high standard.

Those articles are not to put a nominee on notice. They are to tell the public, what is the reason a judge might be removed from office, and to tell other judges. And part of the problem with this case, the reason this case is unprecedented, is you'll notice they can't cite any case where every single article was aggravated. And in fact if you look at the Archibald case, it was not aggravated -- aggregated counts.

If you look at those articles, they were long descriptions, but they involved one act each.

And more importantly, the reason this is a dangerous precedent and a new model for impeachment is that it is important for the public to know, not just for the Senators to know, as to what it is that led, if this occurs, to removal.

I would like to give you an example if I

may. Mr. Schiff said, well, you know, it's not like these issues and these articles, these claims, these allegations are not related. They are not related. Take a look at article 1 he is citing. Article 1 alleges that the judge should have recused himself from Lifemark, but it also alleges that he had a corrupt relationship on curatorship.

We have separate sets of evidence to knock down both those claims, but unless the Senators establish for the public and more importantly for the rest of the judges on the bench, what was it that led us to convict on that article, they won't know, because that basically is an appearance of impropriety issue.

Another good example, if I may, is if you look at the bankruptcy claim, they have a variety of very specific claims that they say violate Federal law. One of them, they say that he used a PO box instead of his real address for bankruptcy. We have already said in filings we are going to have the trustee himself come and explain why that was not viewed as a violation, and in fact that is not uncommon. We are going to have bankruptcy experts come to say that the markers they refer to are not considered debts under Louisiana law at all. They

are not supposed to be part of the bankruptcy process.

So assuming for a second and you are not here to decide the merits, but assuming for a second that we can carry that burden and show you that these things are not valid. We have already argued on 4 that they say that he should have revealed what an individual named Louis Marcotte told the FBI when he filled out his questionnaire and his SF-86 and spoke to the FBI. What the House members were not told is that conversation occurred after all those acts. So he couldn't have possibly informed them of an act that hadn't occurred yet.

So these are examples, and I'm not trying to get to a merits decision, but if I can convince you that those are true, then you have articles that have within them what we would consider to be entirely invalid claims, and for other judges on the bench it's important for them to know what it is that's involved here.

That is why Senator Sutherland's statement was very important when he said, in the Archibald case that was cited by the managers, he said there is an article here that's omnibus, and he warned his colleagues, I cannot consistently vote upon this

article one way or the other because there is no way to know what I'm voting on.

But the difference here is that every article is that article in this case. And if it's allowed with no change, new precedent will be established.

SENATOR WICKER: Did Senator Archibald's position prevail or was he expressing a minority view?

MR. TURLEY: Well, I wouldn't call it necessarily a minority view because there were other Senators that spoke in the same way, but in fact he did not prevail in opposing that article. But there is a long history of Senators objecting to aggregation. The difference with this case; we have never said there hasn't be aggregated articles; the difference with this case is the entirety of the articles are aggregated. And if you allow that to happen without any change, I promise you every impeachment is going to be aggregated articles. Every single one, why shouldn't they do that.

And when Mr. Schiff -- and I have great respect for him, but when he says, look, if we disaggregate, they would be here complaining about disaggregation. Really? I wouldn't complain about

individual counts, I would try to defeat them. I would have no basis to say how dare you specify with clarity counts against my client. I would want to face those in court.

I also wanted to respond --

SENATOR WHITEHOUSE: Let's say you were looking at an -- again analogizing to a criminal case. Let's say you were looking a case say involving a scheme and artifice to defraud, and a whole bunch of conduct is alleged in that particular scheme and artifice to defraud. The jury doesn't have to agree on every single piece of that having been done; they have to look at the evidence and conclude yep, based on what we see, we do see an scheme and artifice to defraud in this particular case and that doesn't get into the problem of a -- of a duplicative or duplicitous verdict.

Isn't that the case here, as well? Because these courses of conduct are integrated enough that they can fall within the general impeachment standard of high crime and misdemeanor?

MR. TURLEY: I would agree with the first half of your question, Senator. There is no question that when you have a RICO case or fraud case you are going to acts that lead to that. In

fact you could have predicate acts that are contained within those. No one objects to that.

Where you would quash an indictment is on something like this. No prosecutor that I have known in my career would come up with an indictment that has totally disparate acts.

For example, Article 2, it says that you should have told the FBI about the fact that Louis Marcotte told you he gave you a "clean bill of health," even though that conversation hadn't occurred yet. But then it says, and by the way, you also are being removed -- we want to remove you because you had a bunch of corrupt bonds with Marcotte.

Those are vastly different allegations. One deals with how horrible it is for someone to walk up and say, I gave you a clean bill of health, and the other one is that you had -- you cut corrupt bonds, even though they don't cite a single bond that was corruptly given.

I guess what I would suggest, in fairness to the committee, is if you put yourself in the position of the defense counsel, in trying to knock down each of these articles, I'm going to be putting on vastly different cases.

For example, in Article 2, we have basically three cases we are putting on, they are unrelated. We are going to have separate witnesses, separate claims. That is how different they are. When you see a trial, we are going to have a whole different case because they are unrelated.

I would suggest looking at Archibald, those are cases that basically follow what Senator Whitehouse was saying, was that basically you look at those and they are a series of facts leading up to a single claim. I would have no objection to that.

My final point is when we look at the precedent -- I would suggest Senator Hatch, that the precedent does not support all articles having this degree of aggregation, honestly. But --

SENATOR HATCH: Well, if I can interrupt you on that. You said earlier that we can take "preliminary votes," on specific conduct, within, say, a specific article. Can you point out to me any impeachment trial where that has occurred?

MR. TURLEY: No Senator, I can't because we never have had an impeachment trial when it has been all aggregation. When you had an omni article before, which has come up in a few of the cases, Mr.

Schiff is correct, the defense has objected, and those have not been successful. Senators have objected, and they may have done something in their deliberations to deal with that.

We have never faced this, this degree of aggregation.

What I would suggest to you, Senator, is that when you look at the history and the purpose of this institution, I don't want to sound like late Senator Byrd, but this institution represents something special to people around the world, and it represents fairness. And when you have a judge who is accused, who is about to be removed, it's not just that he has a right to know; the public has a right to know; other judges have the right to know.

The problem I have with Mr. Schiff's argument --

SENATOR HATCH: The basic argument is one of fairness. I mean that's what it comes down to. That you feel like, under the circumstances, this would not be fair, even though you can't point to anything in the past that would indicate that they can't do what they're doing here.

MR. TURLEY: Well, that's right. I mean it's like saying how did you react the last time you

had been hit by a bus. I never have been hit by a bus before. And that's what this is. This situation, the thing that alarms me the most is that this hasn't occurred before.

And when I thought that Mr. Schiff sat down too early was when he was asked, why not do this? I mean, isn't this better? Wouldn't this be better? In terms of the purposes of impeachment, in terms of the American people, why wouldn't we want to have this type of preliminary vote to be clear? And wouldn't it be better for ourselves, wouldn't we want to know whether 2/3 of our colleagues agree on this?

The answer to that I think is pretty clear. This would be a better system, particularly for Federal judges who have a need to know? I don't think the House managers disagree, this is the first time that we have a judge who is being -- they are trying to remove for appearance of impropriety, things like lunches. I got to tell you, there is a lot of judges around the country that are looking at their date planners right now and wondering, since when did a lunch, which doesn't violate the Louisiana ethics code --

SENATOR McCASKILL: Isn't it true

Mr. Turley, that we can cure the problems that you have eloquently set out, by the way in which we deliberate and the way in which we convey those deliberations and decisions to the public? That there is nothing that would prevent us from doing exactly what you were advocating within the Senate by the way we organize our deliberations, take our votes and report them?

MR. TURLEY: Yes, and I am in accord with Mr. Schiff on that. You could, in fact, do that. What I would encourage is that you make that public, you make it public on how you came on these individual issues, so that there is a public record. Because that goes to the purpose in my view of the article.

SENATOR McCASKILL: I find the part of your argument that our decisions and discussions be made public the most compelling time of your argument. So I appreciate it. And your time is up.

MR. TURLEY: I am happy to end on that note. Thank you.

SENATOR McCASKILL: We appreciate it. We will now take arguments on the second motion that is being pursued by the House managers, and that is the motion concerning prior testimony.

CONGRESSMAN SCHIFF: Madame Chair, would that be the prior testimony of Judge Porteous or the prior record including prior testimony?

SENATOR McCASKILL: Prior record.

ORAL ARGUMENT OF CONGRESSMAN SCHIFF

ON BEHALF OF THE UNITED STATES

HOUSE OF REPRESENTATIVES

CONGRESSMAN SCHIFF: Madam Chair, Senators, the House seeks to introduce the prior record in this case, consisting of the proceedings before the Fifth Circuit as well as the proceedings before the House of Representatives. What is also clear from the Senate precedent in many of the cases we cited already is that in each of the cases where this issue has been raised, the Senate has made it clear the Federal rules of evidence don't apply.

And I should say at the outset, I would like to reserve ten minutes for my response.

The Federal rules of evidence don't apply. The rules that apply in criminal cases are similarly inapplicable here. Prior testimony and records can come in; that has been true with each of the cases where it has been raised. And that the Senate is capable of giving prior testimony the weight it deserves, and I think this is the most fundamental

point, which is you are the triers of fact and you are the judges, we don't have a separate jury here. And you are capable of giving prior testimony and the circumstances of that prior testimony whatever weight you believe it deserves.

If You believe it deserves great weight, you can give it great weight; if you believe it deserves no weight at all of course you are free to give it no weight at all. In the Nixon case, probably the case most clearly on point here, the Senate admitted all prior testimony and exhibits in their entirety. And the Senate trial committee emphasized that the introduction of prior testimony and exhibits will be useful to enable the committee to focus the live testimony that it hears on the most critical witnesses.

That is very much the case here. Admission of the prior record in this case will serve the same purpose as in Nixon; it will allow the live testimony to focus on the key witnesses. And not only the key witnesses, but also key portions of the testimony of the key witnesses. And this is very significant in the light of the time constraints on the case. We are going to try this, the Senate has asked us to try our case in 20 hours.

If we are to accomplish that within 20 hours, that means not only can we not call every witness we might call, but also even the witnesses we do call, we want to focus in on the most critical portions of their testimony. And in order to do that, it will be important for us to be able to rely on the record of their prior testimony.

So I think in order to give both our presentation as well as the presentation for Judge Porteous within the time constraints that the Senate has set out, it will be important for us to try to stipulate to as many facts as we can that are not in disagreement, that we allow prior testimony where there is no issue about the prior testimony, to be considered by the Senate.

Of course, the defense is more than capable of calling any witness who testified previously, taking issues with any prior testimony, but it will greatly facilitate focusing on the key issues to be able to have the whole record before the Senate.

It's also I think significant in terms of the Senate's own rules, Senate Resolution 458 empowers this committee to transmit the record of the proceedings during the trial as well as all

evidence and whether it's contested or not contested to the full Senate.

So this would be part of the package that the committee would transmit to the full Senate.

With respect to the Fifth Circuit prior record in particular, that was a record that the Fifth Circuit itself decided should be provided to the House in its entirety. That was an issue that Judge Porteous took issue with the Fifth Circuit. The Fifth Circuit decided that all of the proceedings before the Fifth Circuit as well as the grand jury testimony could come into the Fifth Circuit proceedings; and they also made it clear, some they would give weight and some they wouldn't give weight, but they wanted the entire record.

Fifth Circuit also made it clear they wanted to transmit the entire record to the Congress for its consideration in a potential impeachment. That was a decision not only of the Fifth Circuit, that was the decision of the Judicial Conference of the United States, which is chaired by the Chief Justice of the United States.

So the Judicial Conference of the United States also said that all of these prior records should be considered by the House in terms of

whether to impeach. And I think it would be an extraordinary result for the court itself in the Fifth Circuit, for the Judicial Conference chair by the Chief Justice to say all of these materials should be considered by the House for the purposes of impeachment, but they cannot be considered by the Senate.

I think the Senate would be depriving itself of the complete record if it decided not to allow the introduction of the prior testimony and exhibits.

SENATOR UDALL: Counsel, has there been any record in the past in any of these previous impeachments where the denial of a record has occurred or a proceeding has occurred? Has that happened at any point?

CONGRESSMAN SCHIFF: I don't think there has been any case where the Senate has denied the entire request to introduce prior testimony or exhibits. There have been cases where the committee has decided, okay, we will accept this part of the record, we will accept this part of the record.

Nixon was the most expansive. We will take the entire criminal trial of Nixon, we will take all the House proceedings in Nixon. That was

the most expansive. Others have parsed it differently.

The issue in the Hastings case was a different issue. In that case Judge Hastings wanted the record to come in, but wanted the record to come in for the purposes of making a kind of double jeopardy argument. You have all this before; you shouldn't impeach me for conduct that I was tried for and acquitted. So the court made a ruling that was more pertinent to the purposes for which that evidence was being offered.

There has been no case where the committee has said, no, we won't consider any of the prior record.

SENATOR McCASKILL: Am I correct -- I'm sorry. Go ahead.

SENATOR UDALL: In the general rule, it sounds like, has been to expand the record, to have the record as full as possible, and then the Senate would determine -- and the House for that matter, in their earlier articles of impeachment -- determine what weight they want to give those particular records, isn't that correct?

CONGRESSMAN SCHIFF: Yes, I think that's exactly right. The Senate has sort of erred on the

side of being more inclusive, letting more evidence in, and giving it what weight it deserves. The Senate has you know, from time to time considered okay, were these witnesses the subject of cross-examination? And in many cases they were the subject of cross-examination, and I think that made it easier for the Senate to say okay, all that can come in.

Now most of the witnesses we are talking about here have similarly been the subject of cross-examination, either by Judge Porteous in the Fifth Circuit, or during the House proceedings or during the extended depositions we had earlier this week. Some of the testimony as in the grand jury testimony has not been the subject of direct cross-examination, in that counsel were not present during the grand jury proceedings, but those witnesses by and large have been the subject for cross-examination, both in the Fifth Circuit proceeding, in the House and in deposition.

So if counsel had any issue, for example, with the key witnesses -- with Creely or Amato or the Marcottes, and took issue with something they said at the grand jury, they had two and a half hours to cross-examine them during the deposition

and say, well you said this during the grand jury, and what about this? So they had ample opportunity to cross them on the subject of those prior testimonies, even if they were not present to do cross during the prior testimony.

But it would be an extraordinary thing for the courts themselves to say you should consider this, and for the Senate to decide, we won't consider this. I think the better practice has been, in terms of the Senate precedent, is you accept the record, and with any particular piece of evidence in that record, you can decide, well, you know, this was subject to less cross-examination because in the House this witness was not cross-examined at all.

Now the witness wasn't -- we have a bankruptcy expert for example, who testified at the House about bankruptcy law and procedure. We may or may not want to call that witness depending on how much time we have during the trial. It may be that nothing that witness said is at all controversial. Now it would be advantageous, I'm sure, for the defense to say don't include his testimony, make the House use part of its time to call that witness. It gives them incentive not to stipulate to the facts

of that witness.

What is the purpose to be advanced by that, though? That is more in the category of gamesmanship.

So why not have that bankruptcy witness? Now they didn't cross-examine that judge. So counsel can point and say prior committees have been very concerned about whether someone is subject to cross. The reason that bankruptcy witness was not crossed is because they declined to cross him.

So yes, we had an initial 10-minute requirement which we waived any time they were asked, but they didn't choose to cross that witness for 10 minutes, so why should that witness's testimony be excluded?

SENATOR MCCASKILL: Congressman, let me interrupt for a second. Am I correct in understanding that the House does not intend to use the grand jury testimony and the task force depositions as substantive evidence in the trial?

CONGRESSMAN SCHIFF: I don't know that I can say categorically. Again, it will depend on I suppose how much time we have to offer each witness. It may be, for example, that we introduce -- we have obviously we are going to call, let's say Mr. Amato

or Mr. Creely, and we elicit testimony from them on the stand about the kickback scheme, or the payment during the case, or what have you, and we don't go through all the other conduct, all of it. Every hunting trip, every fishing trip, et cetera, it's already in the record.

Rather than going over everything that is already in the record, it may be advantageous to offer that and be able to point to that in argument. For that reason I can't say we would exclude all of that, but of course, if the defense had any issue with that, and said, well, counsel is pointing to something that this witness said, we want to be able to call that witness; or conversely, we think you shouldn't consider that because they weren't the subject of sufficient cross-examination; or Judge Porteous was in between lawyers, owing to his own responsibility, not the Fifth Circuit's, you can make that decision, well, we're going to give it that less weight.

SENATOR McCASKILL: All right. Your first ten minutes are up.

CONGRESSMAN SCHIFF: Okay. I will reserve the balance of my time. Thank you.

SENATOR McCASKILL: Mr. Turley?

ORAL ARGUMENT OF JONATHAN TURLEY
ON BEHALF OF JUDGE G. THOMAS PORTEOUS, JR.

MR. TURLEY: Thank you. I would like to start out by responding to a couple of arguments Mr. Schiff made, but first I want to know. Mr. Schiff has said it decided that we would have 20 hours in this trial.

As you know, we have a pending motion, but there has been no decision as far as I know how many hours each side would be allotted. We have a motion pointing out that currently we would be getting less than half the average that has been given previous judges, so that is a matter that is being contested. But I know of no specific decision as to a specific number of hours.

I will also note that the House managers are opposing a longer trial, and then they're saying, but you know what, because the trial is so short, we really have to bring in all this evidence regardless of how it was gathered and what objections they may have, because we really need to do that.

That is a rather make-work argument. What we are saying, by the way, is not that you can't use evidence from these earlier proceedings. We

recognize that you can use this evidence to rebut or impeach a witness, just the way you can in a usual court proceeding; but what we have stressed is really what the House managers have argued.

When we were looking at the depositions this week, we said we would three hours -- we would like the full three hours. We want three hours with these witnesses and the House said oh, no, no, you have to give us at least 30 minutes. And we said why? You have already deposed these witness; you've had plenty of time with these witnesses; this is our only opportunity. And they said because it would be grossly unfair. It would be one-sided, it wouldn't be -- you know -- reliable evidence.

And when I objected and said, well, you barred us from all those previous depositions, you wouldn't let us participate in them. And they said that was just investigatory, that's more like a grand jury. But now they're coming forward and saying, by the way, we want to turn that all into testimony; we want it imported in the case.

When the Chairs have asked -- and I think legitimately so -- and the Senators have asked, has there ever been a turndown of a request to bring in records of this kind? The answer -- I disagree with

Mr. Schiff; there has. There was a partial turndown. I believe it was Hastings was only partially granted, but there is a big difference here.

All of the impeachment cases cited by the House managers had criminal cases, in some cases multiple criminal trials. The information that was being imported had already been synthesized. It had already gone through the criminal, you know, trial process. A Federal judge had already determined what could be brought in.

And I would also cite the committee to the House's own statements in the House impeachment proceeding. When Judge Porteous was facing the committee, he was instructed by Mr. Schiff that this is not a trial, it's more in the nature of a grand jury proceeding. Right?

He was told that this does not constitute a trial, the procedural rules that govern a Federal trial do not apply. This was emphasized to him that he would should not be making a lot of objections and he would be limited on cross-examination for that purpose. I will remind the committee grand jury transcripts are not allowed into Federal court except for the limited purposes of things like

impeachment, for a very good reason; because they are undeveloped, they are not challenged.

And I don't wish to get into a disagreement with Mr. Schiff about what happened on Monday. I would just simply encourage the Senators to look at what happened on Monday, to look at the transcript. It will tell you lot about this case. But you will see what happened once these witnesses are actually subject to cross-examination.

Now Mr. Schiff said, well, with one of these bankruptcy witnesses, they didn't cross-examine them. I'm not too sure the reason. That was done by the attorney that this committee replaced due to a conflict. Okay?

If I had been the attorney, you betcha, I would use the full 10 minutes. But in terms of Marcottes, half of what the House has said were the critical witnesses, because of that conflict, Judge Porteous was left without counsel, and so he did not examine Marcotte.

In the Fifth Circuit, the Marcottes didn't testify at all.

So what we are saying is simply to apply a simple rule of fairness. If this was a criminal trial, if we had gone through a criminal trial and a

Federal judge had allowed in some information, even grand jury information, on impeachment, I would not be standing here and saying, even though a Federal judge brought it in in a criminal trial, you shouldn't, because you would laugh at me, and so I would not say that and I do not believe that.

This is a different circumstance. This is -- to be honest, it is unfiltered evidence, and one of the things that we pointed out in the depositions is a lot of this garbage.

Now, one of the thing that Mr. Schiff has said is, well, you can just called all these people. Well, so can the House. The House doesn't explain why it would want to rely on testimony of a witness that didn't have a vigorous cross-examination. If they want to use that evidence, call the witness, and have the Senators see the witness on the stand, and more importantly, have Judge Porteous with the right to cross-examine.

When we cross-examined Creely, he expressly denied there was a relationship between loans he gave his lifetime friend and curatorship. He actually said he usually ruled against me. That didn't come out in those earlier proceedings because it's the type of information that the House didn't

want to elicit. Now what I would suggest --

SENATOR UDALL: Counsel, but the Marcottes are going to testify. They have been listed as witnesses here. This is the example you've used, correct?

MR. TURLEY: Yes, sir.

SENATOR UDALL: So the Marcottes are going to testify. There is going to be a cross-examination of the Marcotte testimony, the direct and examination, however you choose to do that. So in admitting that the prior proceedings, we are -- we can give whatever weight we want to that, in addition to what we see occurring before us, can't we?

I mean, what is your objection to having the testimony from additional proceedings to supplement the record and expand the record, and we give it whatever weight we choose to give it?

MR. TURLEY: Well, I certainly agree with you, Senator, that it is less problematic when the witness is appearing. I would suggest following the standard rule that to the extent a witness disagrees with the testimony, Mr. Schiff can jump up and say, I want to bring in the record what he said from the Fifth Circuit, and I could hardly object to that.

That is a standard use of the that type of information.

SENATOR UDALL: Has there been a precedent for that, in these kinds of impeachment hearings before the Senate?

MR. TURLEY: There has but -- well, it was different for the Senate, because they -- because you had earlier criminal trials, many of these judges, some of these judges that were cited did not object to the evidence being brought in, because it had already been essentially filtered through a Federal judge. So it was not very controversial. No one seriously argue you should not look at the record of a criminal trial.

SENATOR UDALL: You seem to be making the argument that the proceedings that are being offered into the record are somehow less reliable than a criminal trial. Are you making that argument, and are you going to make it right here now, that why these are unreliable, why they shouldn't be in? Why -- were they run in such a way that they weren't fair? Were they kangaroo courts? What was going on?

MR. TURLEY: Well, they are demonstrably unreliable and what I would suggest is not to take

my view for it. I would strongly suggest that the Senators take a deposition that the House did with one of the four, we only got four, one of the four people that we dealt with on Monday. Put that deposition for someone like Creely or Amato next to the deposition we did on Monday, and compare them.

And what you will see is that in the House deposition, they really tried to get these witnesses to say what they wanted to say. You can see Amato struggling, and they're saying, "Isn't it true?" "Isn't it true?" "Don't you want to say this?"

And as soon as he says this, his deposition is over. And then in our deposition we basically said, explain that. What did you -- is it true that, you know, you bought lunches only for Porteous?

And both of them said they know of no judge in Jefferson Parish, except for one, that on one occasion, a judge in that parish bought her own lunch.

SENATOR JOHANNIS: Counsel, if I could stop you there. I sat through the Creely deposition, and to suggest that this is about a purchased lunch is really, in my personal opinion, very misleading.

Now, we are going to judge the evidence at

this point, and the difficulty I have with what you are saying is that you are trying to get us to almost a criminal case sort of standard. When, in fact, I believe we have a right to receive evidence, review the evidence, decide should give it be given any weight whatsoever, accept it or reject it, and so I must admit I don't see where you are going with this argument.

And again, I will emphasize, please don't try to convince my colleagues that the Creely deposition was just about a free lunch. It was not, and I can cite what I heard that day, but let's not go there. We are not trying to decide the evidence at this point, but I just -- I don't see how you get us to a point where we can't accept evidence for whatever value it has. And it may have no value in our minds. And I think that is where you are trying to take us with this argument. Do you agree with that?

MR. TURLEY: Well, let me explain if I can; I am not going to get into the lunches, except that those are part of the House report. Those are the allegations. It's not the sole allegation. I was just giving an example of why you shouldn't rely on an issue like that, what was said before.

But more importantly, I am not saying that you shouldn't see evidence. What I am saying it that it is grossly unfair to the defense to allow the House simply not to call witness, bring in testimony that the House itself said, that this is like grand jury testimony -- we are not going to give you the same protection -- and what you will have for the defense is that chaos.

I mean, the thing is, look, I have four children under 12. I am used to chaos, but I'm not used to having to get through the chaos in a matter of a week, with four separate effective counts. And what's going to happen is that the House managers are going to say, why should they call any of these people?

They have their one -- what they themselves defined as one-sided testimony. They were not going to call them, and they are going to have us eat our time. Instead of saying for either side, if we want to prove the case, then let's present witnesses. And let's have both sides ask those witnesses what the facts are, and with the reservation that you can bring in the record if any witness says does not say something that is truthful or that you want to contradict.

That is the standard to apply across every courtroom in the country.

SENATOR HATCH: Mr. Turley, this is not every courtroom, and frankly you had two and a half hours with each of four witnesses as I recall. I sat there through one of them. And you had an opportunity to cross-examine them, and I was in the room with Mr. Marcotte, and you did an excellent job. So did the -- so did Mr. Schiff, I was very impressed with both of you. But you are not saying you need more time now to discuss it with those witnesses? Or is that what you are telling us? Or what is your argument here today?

Because I think you've got enough information that you can make whatever case you want to make. I am impressed with your ability to argue; I mean, I have always been impressed with you as a law professor and as a lawyer. But what are you asking us for? You are asking for -- I mean, we are getting the impression that Judge Porteous just wants this delayed and delayed and delayed and delayed.

MR. TURLEY: No, we will be ready for trial. We're not going to try to --

SENATOR HATCH: Okay. But are you asking

for something more from this tribunal here?

MR. TURLEY: Yes, Senator, and first of all --

SENATOR HATCH: Then tell us what you are asking for. Because you know, I understand the arguments, we don't want to be unfair to you and certainly not to Judge Porteous. And I above all don't want to be unfair to anybody here, but I'm not quite getting what you really want us to do here.

MR. TURLEY: Well, first of all, Senator, you were extremely fair during the deposition, I want to say that, I think all parties said that. And we have no disagreement with the deposition. What I'm suggest is the standard rule for cases. That --

SENATOR HATCH: Again, this is not a criminal trial. This is not a criminal court. And all those arguments would be good in a criminal court in my -- most all of them. I have to say I might have a couple I would disagree with. But you know, the key here is for us to get the facts and to get the information and to understand what the House has concluded here. And to allow you the privilege of showing them that they are wrong, if you can.

MR. TURLEY: Yes, I understand that,

Senator. I'm sorry.

SENATOR HATCH: Tell me, what do you want from us?

MR. TURLEY: Well, the four people that we were allowed to depose, my expectation is that some of this material will come in on both sides.

SENATOR HATCH: But can't we look at that material and read it?

MR. TURLEY: Since they are appearing I have less of a problem with that. Our problem is that the House interviewed 70 individuals, 70 individuals and did 25 depositions where we were completely barred from participation.

SENATOR HATCH: Are you making the argument you should be able to interview every one of those 70 witnesses? You have a right to do that.

MR. TURLEY: Well, I would certainly loved to, we have tried to interview the witnesses, and they refused; some of the House's witnesses have refused to speak to us. So we're stuck. It's going to be "gotcha" testimony. They're going to hit the stand and I'm going to have no idea what they're prepare to testify to. But what we're suggesting, I think, Senator, is that for those the four that were deposed, I have less of a problem with material

coming in because it will be in the trial, and we will be able to test it.

My problem is that the House is going to be able -- unless this body says you cannot use prior records for witnesses that are not going to appear at trial, then they have every incentive in the world not to call people to trial and to use one-sided testimony.

We could not possibly call 70 individuals without eating our time. Basically under the current schedule, at most we have two and a half days to defend allegations where they are going back 25 years in pre-Federal conduct. 25 years when he was a State judge.

SENATOR HATCH: You have a right to do that, too. I mean, you may not have the same authority that the House of Representatives has, but you have the right to go in and get all those 70 people.

MR. TURLEY: But they can refuse. Very few people refuse the FBI and the House when they come knocking. When a law professor comes knocking, a click is heard on the other end of the phone.

SENATOR McCASKILL: Mr. Turley, it seems to me that your argument is that if you have not had an

opportunity to cross-examine the witness, that any prior testimony of any witness that you have not had an opportunity to cross-examine or depose should not be allowed as evidence in the trial. Is that the argument that you are making?

MR. TURLEY: Yes.

SENATOR McCASKILL: Okay. So what you are basically saying is that the United States Senate should be looked at as like a jury, because a jury, there are certain rules in a criminal courtroom about what testimony -- what prior testimony can come in and under what circumstances. But this is not a jury.

In fact the Senate serves as both the judge and the jury and inherent in the impeachment authority is the notion that the Senate is going to deliberate with all of the information and give it appropriate weight.

And don't you believe that we are going to look at the testimony of these witnesses that have been -- I might add that the deposition I sat in on, Judge Porteous didn't even use the full time allotted to him. And this is against one of the key witnesses that says, yes, I am ashamed; I was part of the scheme to kick back money to the judge. But

yet, the full amount of time was not even utilized. We adjourned 15 minutes early in that deposition.

So I am having a hard time in grasping the notion that the Senate should not be allowed to look at the same information that the House has looked at and allow us to give it appropriate weight based on whether or not there has been cross-examination, based on its inherent credibility, based on how relevant it is, based on how key it is to the accusations that have been made to Judge Porteous' conduct.

It seems to me you want to keep information out of the hands of the Senate, because you are viewing the Senate more like a jury in a criminal trial than the United States Senate in an impeachment proceeding.

MR. TURLEY: What I would respond, Senator, is that first of all, if this were a bench trial, and I've certainly been in bench trials, I'd would make the same motion. Judges all the time exclude evidence on the basis -- if this were a bench trial, and the House came to a judge and said, by the way, we may decide just not to call a bunch of witnesses because we would like to rely on the grand jury or unadversarial depositions --

SENATOR UDALL: Counselor, isn't the argument that you are making here arguments that you had should be making at the end after the evidence is presented? It seems to me from what Senator McCaskill's asking.

SENATOR McCASKILL: About weight.

SENATOR UDALL: Yes. We're --

SENATOR McCASKILL: It's an argument about weight.

SENATOR UDALL: This is -- after -- the arguments you are making, you are asking us to make a judgment in advance after not seeing the entire case, the presentation that the House counsel makes that you make. And after it's all been done, you can then make the argument to us that because the following happened, these particular pieces of evidence in other proceedings shouldn't be looked at, but I don't know what really the argument is here now at this point in the proceeding.

I'm still trying to understand, as I think or our Chair is trying to understand, what are you trying to get at? What are you trying to get us to do? And understanding that, we're sitting as the Senate in an impeachment as jury and judge in this case, and I think you are trying to limit that to a

larger extent than there is any precedent for.

MR. TURLEY: Senator, the way I view this -- obviously there is a difference in perspective. I actually want the Senate to hear all these witnesses. I would love the Senate to hear all these witnesses. That's my point. If I was given time, if we had a trial where I was allowed to call all these witnesses, I would drop this objection like a stone. I mean, the problem is, I am not going to be able to do that.

If this rule stands, the way the House wants it, they can literally demolish our time by simply saying, we are not going to call a whole bunch of witnesses, we are going to use their testimony, so in a two and a half-day period, I would not only have to put on a case in chief, I would have to bring in as many as 70 witnesses to get them to admit that they said something untrue.

Now if I was given the time, if I was given like a normal trial, if I was told you are going to bring in any one of these relevant witnesses; any one they want to use, you can call; I have no problem. But the problem is logistics. You are not going to get the whole story, because there is no way on God's green earth that I will be able

in that period of time to handle 70 witnesses who aren't appearing.

And that's our objection. All we were saying is, if you want to use the evidence, call the witness. If the witness is there, we have less trouble with using the evidence from the record.

SENATOR McCASKILL: Well, then perhaps the argument you need to be thinking about, Mr. Turley, is at the point in time that we are in the trial, as you indicated earlier, there is no decision made at this point how long the trial is going to be. And if you believe that evidence has come in that could be rebutted, if you have the opportunity, then I think that at that point in time that would be a point that you would come to this committee and say, you have received this evidence in this document; we have reason to believe that we can rebut that. We would like an opportunity to call that witness and rebut that.

And I think that -- and the other thing that is going on here is we want as much as possible in this record to encourage stipulations. There is a lot of stipulations that the two of you can do on facts that would streamline this considerably. And This is a very important matter and we all take it

very seriously.

We all understand -- you know, we all understand the importance of an impeachment trial in the United States Senate. But it's also important that everyone around this table have the opportunity to do the other work that they are called here to do, and there is a lot of that important work, also.

So I think that one of the reasons a more expansive view may be argued for is that if all of it is going to come in, and we are allowed to give it appropriate weight, and we are going to listen to the arguments you make about opportunities you want to rebut it, it might encourage more stipulations to the facts that really aren't in controversy.

MR. TURLEY: May I respond, Madam Chair?

SENATOR McCASKILL: Yes, your time's up, but you may respond to that.

SENATOR HATCH: Well, let me make a point. We have taken a lot of your last half of your time. So I would be for giving him a little more time if he needs it.

SENATOR McCASKILL: Sure.

SENATOR HATCH: Okay.

MR. TURLEY: Thank you very much, Senator.

What I would respond is that it is true

that you've held in abeyance the question of the time for the trial. The problem is that the -- we have already passed the date for the specification of witnesses.

The House gave us a preliminary list of roughly, like 17 witnesses. The problem with the argument of the House is they're saying, we are going to call these witnesses, potentially, but they are also saying, and by the way, we may be indirectly calling any witnesses behind this curtain. There is 70 witnesses behind this curtain, and when we get to trial we are going to pull back the curtain and we are going to say, now we are going to introduce all this evidence of this person who talked with us before.

There is no way for us to prepare for that under this rule. Mr. Schiff just said when he was asked, do you intend to bring in the grand jury or the Fifth Circuit? He says, I don't want to say absolutely one way or the other.

What that does for me is I have absolutely no ability to prepare. We just put in witness lists. I think we have a wonderful witness list to rebut their witness list, but now they are saying, except for the people behind the curtain.

And by the time they have those people come out indirectly through the transcript, will be the first time I know about it. And it will be "gotcha" testimony, which is something we have not seen in the Federal courts for decades. And that's my basis for my objections.

SENATOR McCASKILL: But you've read all these documents, you know what's in them.

MR. TURLEY: Well, we're still fighting over some discovery, but it's true, we have read those documents, but --

SENATOR McCASKILL: So this is not behind the curtain; it's part of your preparation. This is no different -- I mean, we keep going back and forth, but if all of us, our point of reference are trials we have participated in. I was required as a prosecutor to make sure the defense knew all of the potential evidence I might present, but that didn't mean I was going to present it all.

You have all the documents. It's not as if you don't have the information, and if there's the information in those documents you are concerned about, you had have an adequate opportunity to address that.

MR. TURLEY: Well, I would say, Senator,

that when you were a prosecutor, you had to have a finite list of actual testimony. You would have never get been able to get this type of testimony coming out of the record.

The problem is yeah, I know what this record says. But what the rule would allow them to do is to go to the Senate and say you know, here's three dozen people that we are not going to call, and we're just going to read what they said in one-sided depositions.

I can't even call them at this point. I don't know who they are going to be citing that. I don't have the ability to call them, because they haven't told me, so we couldn't put them on the list. But even if I did, that would be a list of 70 people.

And so yes, we know what's in the record, we just don't know what direct testimony is going to be brought out of that record, and thrown into this trial and then it would be too late for us to do anything about it.

SENATOR McCASKILL: I think we understand your point.

MR. TURLEY: Thank you.

SENATOR McCASKILL: Congressman Schiff?

REBUTTAL ARGUMENT OF CONGRESSMAN SCHIFF

ON BEHALF OF THE UNITED STATES

HOUSE OF REPRESENTATIVES

CONGRESSMAN SCHIFF: Senators, I have a very few additional remarks and I am happy to entertain any questions you have. Just a couple of comments. And that is, I think a lot of this will be resolved I hope by our efforts to stipulate uncontested facts.

The problem with excluding all the prior record is there is no incentive for the opposing counsel to stipulate to anything. They'll simply say call them; call them all. Call the custodians of the records. Call the people necessary to lay the foundation for the curatorships. Call all these people. I don't think it's the interest of the Senate or called for by any considerations of fairness.

I think that the gravamen of what is at issue here, and many of you have alluded to this, was best summarized by Professor Black, Yale Professor Black, in the Nixon -- Judge Nixon impeachment case when an analogous issue came up. And the Senate committee cited this in their report in allowing in prior testimony. Quote, "both" --

this is Professor Black -- "both the House and Senate ought to hear and consider all evidence which seems relevant without regard to technical rules. Senators are in any case continually exposed to hearsay evidence. They cannot be sequestered and kept away from newspapers like a jury. If they cannot be trusted to weigh evidence, appropriately discounting for the other factors of unreliability that have led to our keeping some evidence away from juries, they are not in any way up to the job, and rules of evidence will not help."

We have every confidence that the Senate can weigh the evidence, give it what weight it deserves. If there is a witness we don't call, we don't call them at our peril. And you may decide we are not going to credit that. You had an opportunity to call them; you didn't do it and we will give that very little or no weight.

All of the central witnesses in this case are going to be called. I don't think there is any point in calling superfluous witnesses or witnesses that don't have contested testimony; and by admitting the prior record you give yourselves all the information to credit or discredit as you choose.

SENATOR McCASKILL: Mr. Schiff, would you agree that some of the Fifth Circuit and some of the House proceedings are in fact irrelevant to the articles that have been brought?

CONGRESSMAN SCHIFF: There is a subset of issues that were brought before the Fifth Circuit that are not pertinent. I don't know whether there is anything in the House proceedings that is not pertinent. But there are -- and certainly we have no intention of relying on evidence or introducing facts that are wholly irrelevant to the articles; and if we were to try, the Senate could call us on it and say, you know, Counsel, why are you pursuing that line of questioning or trying to introduce testimony that has no bearing on the articles?

SENATOR McCASKILL: I guess I am getting at the fact that the precedent could be abused. The precedent is that everything comes in and the Senate weighs the evidence accordingly.

On the other hand, the same arguments I make about encouraging stipulations for the efficiency and effectiveness of this trial also go to the notion that we would be hopeful that you would only seek to admit that which is relevant, and that which matters and makes a difference in terms

of the articles that have been brought.

If you try to admit the kitchen sink, I think it certainly gives more weight to the argument that Mr. Turley is making, that he maybe feels like he is boxing shadows because he is not sure what is coming in and what is coming out. So I would at least hope that you would apply the test of relevancy to those materials that you are trying to admit in front of the Senate.

And we obviously will consider this motion along with the other motions we are hearing today when we deliberate later. But I think that what we are really talking about here is not just fundamental fairness, but making sure that we are not -- the staff behind us and all of us, are not going through reams and reams of materials, because we have not been privy to all of it. And I think we would all feel obligated if we admitted everything to read everything, even if some of it turned out to be completely irrelevant.

CONGRESSMAN SCHIFF: Madam Chair, it is every bit our intention and expectation that we are only going seek to highlight evidence that is very pertinent to the articles. We don't want to waste your time; we don't want to waste our time. And

ultimately you have the hammer. If we seek to introduce something you don't think is relevant, you are going to give it no weight whatsoever. And if counsel says we need more time because we want access to this witness or we are going to call this witness, you can make the judgment: You know, we are going to exclude that evidence, or you can make the judgment, we are going to give the defense more time.

You will ultimately have the hammer on all these determinations. We had that very much in mind and we don't seek to waste any of your time.

SENATOR UDALL: Mr. Schiff, how do you answer the argument that Mr. Turley made about the witnesses behind the curtain, and all of the things that he seemed to refer to there?

CONGRESSMAN SCHIFF: Senator, as I think the Chair pointed out, there really are no witnesses behind the curtain. And when counsel talks about 70 witnesses, we are not talking about 70 depositions. There have been relatively few depositions. There may have been 70 witnesses interviewed in their entirety.

Counsel, of course, can call any of those people, based on the documents that it already has.

If we choose to call them they can cross-examine them. If we choose not to call them and they have an issue with a prior statement that we rely upon, they can call them, or they can urge than you not consider the evidence.

So as far as I can see. Not only is there no intention to sandbag counsel; there is no way to sandbag counsel because ultimately you will decide whether to grant them more time if they need it, or whether to credit or discredit any prior evidence. But they are well aware of the universe of both documents and witnesses here. There are no surprises except what the defense will ultimately offer in terms of its case.

SENATOR WHITEHOUSE: And, of course, it's clear to you as the prosecutor who will be presenting the case that trying to present to us core evidence that is not subject to cross-examination would be viewed with considerable disfavor and you will be making your decisions as the prosecutor around that obvious disfavor.

CONGRESSMAN SCHIFF: Absolutely, Senator, and that's why I say, if we make a decision to rely on the written record rather than call a witness, we do so at our peril. If you decide that is a witness

that should have been called, you can say, we are not going to consider that evidence, or conversely, you can decide, we are going to allow the defense to call that witness and have extra time to do it, but absolutely, Senator, we will take full responsibility for those that we call and those that we don't, and being very judicious with your time.

SENATOR McCASKILL: Well, thank you, Congressman.

CONGRESSMAN SCHIFF: Thank you, Madam Chair.

SENATOR McCASKILL: We will now move to the third and final motion that we're going to hear today, and that is the motion concerning immunized testimony, and once again, the House managers will present.

How much time would you like to reserve for your rebuttal, Congressman?

CONGRESSMAN GOODLATTE: Chairman McCaskill, I would like to have the clock set at 15 minutes and reserve the --

SENATOR McCASKILL: The final 5, okay.

ORAL ARGUMENT OF CONGRESSMAN GOODLATTE

ON BEHALF OF THE UNITED STATES

HOUSE OF REPRESENTATIVES

CONGRESSMAN GOODLATTE: And I am Bob Goodlatte, a Member of the House from Virginia, and a member of the impeachment managers. And Madam Chairman and Ranking Member Hatch and Senators of the committee, both parties filed motions on this issue. Judge Porteous filed a motion to exclude his own prior testimony from being admitted, and we filed a motion to admit his prior immunized testimony before the Fifth Circuit Special Investigatory Committee. It was determined that we would be the moving party.

It is particularly relevant that the articles of impeachment against him contain substantial issues related to his testimony before the Fifth Circuit, and should be admitted as evidence in this proceeding. In fact, that is, I think, the key argument that I would make to the committee, that his testimony is particularly relevant to the articles of impeachment related to his admitting receiving cash from Creely and Amato; his admitting that these transactions occasionally followed his assignments of curatorships to Creely, though he claims these transactions were not linked.

He further testified that he received an envelope containing approximately \$2,000 in cash

from Attorney Amato when the Liljeberg case was pending. All of this was testimony before the Fifth Circuit Special Counsel. And he admitted that a casino marker is a form of debt. That is particularly relevant to the bankruptcy charge.

The circumstances behind his testimony before the Fifth Circuit are particularly reliable, consisting of statements under oath, soberly given before Federal judges in a judicial forum taken down by a court reporter.

The exclusion of this evidence would undermine the ability of the Senate to render a true verdict in two ways. First, as noted, it would deprive the Senate of powerful, relevant evidence. In fact, it may prove to be the most relevant evidence in this case. And it is audacious for Judge Porteous to suggest that this Senate should deprive itself of the opportunity to consider evidence that came out of his own mouth.

And it would be particularly ironic, I would think, that considering that one of the articles of impeachment, article 4, passed by the House of Representatives unanimously alleges that Judge Porteous concealed relevant information from the Senate in connection with his confirmation to

become a Federal judge.

And I don't believe that it would be at all appropriate for the Senate to now decline to consider relevant information in its decision whether Judge Porteous should remain a Federal judge. Just as the Senate would consider prior testimony of a nominee before the Senate Judiciary Committee in the confirmation process, the Senate should logically consider prior testimony of an incumbent in the impeachment process as well.

We would note that in our prior -- in our pleading, prior testimony of Judge Clayburn was introduced against him in his impeachment proceeding, and I would argue that this evidence is particularly relevant, particularly important, and should be considered by the Senate. You are a fact gathering body to determine exactly what took place, and whether those actions rise to the level of impeachable offenses. And you should avail yourself of all the evidence, but most particularly, evidence related to Judge Porteous's own sworn testimony.

Now, I'm not going to go into all of the arguments. In fact, I can't anticipate all the arguments that the judge's counsel will raise here, but I do want to dwell on two of those points in

particular. And those are, first, that no basis exists for the Senate to decline to consider this evidence. There is, first of all, the analogy that they draw with a criminal case has already been well discussed here today.

In fact, you have already issued one order in this case signed by all 12 of you that indicates that this is not a criminal proceeding, and it is very clear in the Constitution that impeachment is separate from the criminal process. Judgment in cases of impeachment shall not extend further than to remove from office and disqualification to hold and enjoy any office of honor, trust or profit under the United States, but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment according to law.

When Judge Porteous was given immunity for his testimony before the Fifth Circuit, that is the purpose for which it was given. That was a judicial disciplinary process. The judiciary has a limited number of actions that it can take in terms of disciplining a judge.

One is to suspend their ability to sit on the bench, which was done in this case. But another, of course, is to refer the case to the

United States House of Representatives for consideration of impeachment. And that indeed was done in this case. It would, I think, be something that they certainly never intended to take away that opportunity to use the judge's own testimony before them in considering --

SENATOR KLOBUCHAR: But Counsel, was it clear during -- when he was given the immunity, isn't there something on the record about it, that it was immunity from criminal prosecution --

CONGRESSMAN GOODLATTE: Yes.

SENATOR KLOBUCHAR: -- and that it was not stated that it was immunity from impeachment?

CONGRESSMAN GOODLATTE: Well, I believe it was. First of all, the rules of the Ninth -- of the Judicial Council of the United States state very specifically, that in proceedings for judicial misbehavior, judges shall testify in those proceedings.

Secondly, he was notified of the fact that he was being called to testify four months in advance. So the idea that he was not afforded due process here, I think is very flawed, both in terms of the fact that he was given something in addition by the three-judge panel, immunity against criminal

prosecution that is simply not something that they are required to do in order to compel him to testify. The rules compel him to testify, it was not in exchange for immunity that he was given the opportunity to testify.

Secondly, this argument was reviewed up through the process. The decision of the special panel was reviewed by the entire Fifth Circuit, and they then referred it to the Judicial Conference of the United States presided over by the Chief Justice. And in doing so, they then reviewed the issue of due process, and found that there was no violation of due process rights of Judge Porteous going through that process.

And if you think about that, these are all Federal judges at various levels who not only understand due process as well as anybody, but also are making a decision perhaps against their own interest, because they could some day be in a position like Judge Porteous is where this issue could come up.

And they did not find that his -- use of this testimony was in any way to be excluded from this process. In fact, when the case was sent to the House of Representatives, the immunized

testimony of Judge Porteous before the Fifth Circuit was included in the documents that were delivered to Speaker Pelosi.

SENATOR WHITEHOUSE: Counselor, would the immunized testimony of the judge be admissible in a civil proceeding under the order?

CONGRESSMAN GOODLATTE: Well, I would argue that in this case, this is neither a criminal nor a civil proceeding.

SENATOR WHITEHOUSE: But answer my question about a civil proceeding.

CONGRESSMAN GOODLATTE: Well, I would argue that it would be admissible. In Mr. Turley's argument, he says, oh, it should be excluded because in certain -- in one case, these due process rights were afforded because it affected an individual's property. But I find that argument to be the least compelling of their arguments, because this is not Judge Porteous's property, this is an office of the nation, of the people of the United States. And the decision that you have does not relate to either anything in a criminal proceeding or in a civil proceeding that you could impose.

You can't incarcerate him, take away his liberty, you can't fine him, you can't impose

community service or probation. Or in a civil proceeding, you can't enjoin him from any particular actions. You can't fine him with civil penalties. You cannot order restitution to anybody that he may have wronged in this process.

So this is not a civil proceeding or a criminal proceeding, this is a very unique proceeding under the Constitution, and you should avail yourselves of all of the evidence that is available to you, but most importantly, the evidence that comes right from the judge himself. The immunity that he was granted was clearly for criminal prosecution.

If you have the wording of that, you should be aware that it is a very brief statement. There is no doubt that a Federal district court judge could easily understand, and that it was limited to criminal prosecution.

SENATOR SHAHEEN: So, Congressman, let me just -- to be clear, in response to Senator Klobuchar's question, he was made to understand that he was immunized from criminal prosecution, but the issue of whether he would be given immunity from impeachment was never discussed, it was never specifically pointed out to him?

CONGRESSMAN GOODLATTE: It was made very clear that he was immunized from criminal prosecution. Whether there was --

SENATOR KLOBUCHAR: And that the court couldn't give immunity from impeachment.

SENATOR McCASKILL: Obviously.

SENATOR KLOBUCHAR: But there wasn't any discussion about not using it in this proceeding.

CONGRESSMAN GOODLATTE: I am not aware of any such discussion where he would be given any assurance that this was anything other than the normal use for immunity being granted, and that is against criminal prosecution.

SENATOR McCASKILL: And this was in a disciplinary proceeding within the judicial branch.

CONGRESSMAN GOODLATTE: That's correct. And the rules of that proceeding require that he testify.

SENATOR McCASKILL: Right. And for the members of the committee, if you want to review the language of the immunity that was given to him, it is behind the green tab, for the immunized testimony provision. And it is behind tab number 8, and the language is set forth there on the first page behind tab 8, the language of the immunization that he was

given. And it's very clear, against him in any criminal case except in a prosecution for perjury, making false statement, or failure to comply with this order.

SENATOR RISCH: Madam Chair, even if the -- that panel had attempted to, or purported to give that sort of immunity on behalf of this body, I don't see how -- I don't know what we are arguing about here. I mean, even if it said that, I don't think there is anybody here that would argue that the Constitution wouldn't allow anyone to give immunity that only this body could give.

CONGRESSMAN GOODLATTE: Senator Risch, I think that's a very good point. And think about this, if the Senate Judiciary Committee were hearing testimony regarding qualifications of somebody to be confirmed to a judicial appointment, and it came up that there had been prior immunized testimony about something he had been involved with, would the Senate forego the opportunity to consider that to determine whether he was fit to be placed on the bench?

I think that is probably the process and proceeding that is most analogous to what you are doing here. You're gathering information to make a

determination whether he is fit to remain on the bench. And in doing so, you should have available to you, and assess the appropriate weight you think should be given to it, but have available to you all of the evidence that is relevant to the charges that he faces.

SENATOR HATCH: I just have to ask one question, because I'm a little confused here. Was the immunity granted, did that protect him in the state courts as well, or is it just immunity from Federal prosecution?

CONGRESSMAN GOODLATTE: Here is the pertinent portion of the order related to the immunity.

"It's ordered in compliance with 18 U.S.C. Section 6002, 6003, and pursuant to 28 U.S.C. Section 353 that the witness, the Honorable G. Thomas Porteous, Jr., shall provide testimony and other information as to all matters about which he may be interrogated in a proceeding before or ancillary to the United States Court of Appeals for the Fifth Circuit, and that no testimony or other information that he provides under this order, and no information directly or indirectly derived from such testimony or other order shall be used against

him in any criminal case, except in a prosecution for perjury, making a false statement, or failure to comply with this order."

SENATOR HATCH: So it appears to me that that covered Federal law, but it may not cover criminal case in state courts. But just one other question -- and I may be wrong in that, but that's the way I interpret it -- is the House making the blanket argument that the Fifth Amendment right against self-incrimination never applies in an impeachment proceeding?

CONGRESSMAN GOODLATTE: I would argue that the Senate, just as the rules -- this is an office of public trust. And the issue is not whether his liberty will be taken away from him or whether he will be given a fine. The issue here is whether he can continue to hold that office of public trust.

So both in the sense of prior testimony being admitted, and in the sense of compelling Judge Porteous to come before the Committee, just like the Senate Judiciary would compel a Justice nominee to come before the Committee to testify about their qualifications for the office, and answer for any question that might previously exist, I think the Senate has an absolute right to hear all of the

facts and to compel Judge Porteous's testimony. And certainly his prior testimony.

SENATOR McCASKILL: Thank you, Congressman. We will reserve your five minutes for rebuttal. Mr. Turley?

ORAL ARGUMENT OF JONATHAN TURLEY

ON BEHALF OF JUDGE G. THOMAS PORTEOUS, JR.

MR. TURLEY: Thank you, Madam Chair. I would like to address a few things that the House has argued, and to correct what I believe is a fundamental misreading of both our argument and also the issue involved here.

Both sides of this case agree that at no time in the history of this Republic has the Senate ever allowed the introduction of immunized testimony against an accused judge. Never.

And when we talk about a new model of impeachment, we talk about the aggregation issue, and impeaching judges on pre-Federal conduct. This is one of those new issues. And I was concerned that this was being brushed over as, you know, somehow a triviality. I think the question that Senator Hatch asked was the most -- was right on point, when he said, are you saying that the Fifth Amendment will have no applicability in impeachment

proceedings? And the House really didn't answer that question.

The answer is obvious. If you introduce immunized testimony in this case, of course it won't. Just as with aggregation, from this point on, the House will know it can do that. Well, how serious is that? It's quite serious. This is also the first case where the Senate is being asked to remove a Federal judge based on appearances of improprieties, he's not accused of kickbacks. The witnesses have said that didn't happen. He is not accused bribery. He is accused of --

SENATOR WHITEHOUSE: Before you get too far down this road, let's start with going back to Senator Risch's question, which is, I mean, you are presuming that the order of immunity actually purported to have any effect on a potential impeachment proceeding. It says by its terms, in any criminal case. Your client is not just a lawyer, he's a judge. He's capable of reading and understanding something as clear as "in any criminal case." Why do we look beyond that, on its face, it doesn't apply to an impeachment proceeding?

MR. TURLEY: Senator, what I would suggest is in three parts, if I may. One is when you said

he can read it on its face. The way this actually happened is he appeared, and Judge Jones gave him an immunity order. He did not have counsel at that time. And while there's been criticism of my previous lead counsel, he stepped in pro bono to try to give him counsel, to his credit, and he tried very hard.

SENATOR WHITEHOUSE: But he is a Federal judge.

MR. TURLEY: Yes, but they gave him an immunity order, and did not give him time to even read it. They just simply said, this is the order. I would like to see any case that anyone has ever heard of where someone is given an immunity order minutes before they are told to get on the stand and start to testify.

When the House said he was given four months' notice. He didn't have four months' notice that he would be handed an immunity order right there, and said, you're going to testify now. He said -- at the time, he said, I want to have some time, so I can read this and talk to counsel, and the court said, basically, take the stand.

SENATOR JOHANNIS: With that said, isn't that a different argument than you are making?

Isn't that an argument that somehow this testimony was secured under duress or false pretenses or something. And you haven't -- that is not how you are attacking this; is that correct?

MR. TURLEY: Senator, that's a very good point. I was simply responding to the suggestion that he had a chance to read it, but I do believe that the issue that you are raising and also that Senator Whitehouse was raising is pertinent as well. First of all, the immunity grant in this case is identical to immunity grants that all of us deal with in criminal cases. There is nothing particularly unique about it. It's the language you have in immunity cases.

The Supreme Court has said that it is not limited to criminal proceedings. That it is supposed to be something that would extend to things that have a criminal nature. Now, the House said -- you know, I find this really remarkable, he is treating this as property. He is not treating this as property. He is treating this like his life.

The Supreme Court has said it applies to property. This is a lot more serious. We don't believe these things happened. We are going to be presenting evidence that these allegations are

wrong, and the man is defending his life, his livelihood, his job, and his reputation. And what we said was not that this is property like a '69 Chevy. We are saying it's more important than property.

Now, the other problem that I have with the line of argument is, the question for the Senate is not simply whether it can require immunized testimony to be introduced, but whether it should.

And I would submit to you that this is a terrible mistake. I will deal with whatever this Committee decides, but I have to say that I know the Members of this Committee have a lot of members, all the members I believe care deeply about this institution.

I would submit to you that this is a terrible mistake and that it can cause great mischief, because what is going to happen, in my view, in the future, is that the House -- you combine this immunity issue with the fact that they are trying to remove a judge for basically appearances of impropriety.

That is, they are saying that he shouldn't have had relationships or accepted gifts from long time friends, okay? That is a standard that has

never been applied to judges before. And there are judges very concerned about it. But under this standard, you can have a bait and switch; that is, you can have the judge pulled into a proceeding, forced to testify, give him immunity and told -- and if you read our filing, you will see the statements expressly told to him, saying, you know, this is going to protect you and your testimony. I know you don't like it, but you are going to have to testify.

If you allow that to happen, it's going to happen again, and you are going to have, in my view, a terrible convergence of new precedent.

SENATOR WICKER: Mr. Turley, the judge would have been guilty of contempt of court had he not taken the stand and answered questions; is that correct?

MR. TURLEY: Yes, he took the stand.

SENATOR WICKER: But he really had no choice in matter, did he?

MR. TURLEY: That's correct, Senator.

SENATOR WICKER: Now, let me get back to another point you made about the Supreme Court saying that the immunity affects other types of forums. Would this immunity prevent the information from being brought forth in a state court?

MR. TURLEY: I actually disagree, that I do believe it extends to state courts. I think that that's the general thrust of Federal cases.

SENATOR WICKER: So what other examples would there be, other than state court, where the immunity would apply?

MR. TURLEY: Well, what the Court said in cases like Lees is you look to see what is criminal in nature. And that's a fairly broad category, but it is not, I will admit, a well-defined category. They look at things that are criminal in the sense that they're confiscatory or that they're serious in terms of loss of property, loss of job.

It's the type of thing that you would lose if you were convicted of something. And what we've said here is that this is far greater than that. I mean, this is -- it's far greater not just for the accused, but also for this body. That is, if this body starts to say that effectively, we can strip you of your Fifth Amendment rights by just waiting for a previous proceeding.

And when the House refers, by the way, to these earlier cases like Clayburn, that was not immunized testimony. There has never been immunized testimony introduced.

That was testimony at the criminal trial, and there was not an objection in some of those cases. It came in as testimony that they had previously given. The House, I think, admits that this is the first time that they're saying we should introduce testimony, after an individual was told, you will testify, we are giving you immunity, so that it can't be used against you, and then use it against him for purposes of impeachment. Is it technically barred from an impeachment proceeding? We can debate that for a long time.

SENATOR McCASKILL: But there is no precedent to bar it.

MR. TURLEY: No --

SENATOR McCASKILL: And it is legally obtained evidence.

MR. TURLEY: No, I agree.

SENATOR McCASKILL: There is nothing illegal in the way that it was obtained.

MR. TURLEY: I agree.

SENATOR McCASKILL: There is two different issues as to whether or not we compel the testimony of Mr. Porteous at the hearing, and whether or not we admit his previous testimony that was obtained during a judicial proceeding within the judicial

branch. And I would be interested for you to talk about the unique -- I know you are very aware of the unique nature of an impeachment, and what the Founders said about the unique nature of an impeachment, that it specifically was set out by the Founders as something that was not a criminal trial.

And, you know, I need you to help hone in on why a proceeding in another branch that we are trying to check obtained within that branch, legally, would not be admissible here. And then secondly, to hone in on compelling his testimony.

I assume you would have no problem if Judge Porteous took the stand, and we used his previous testimony -- it was used to impeach him. I assume you have no problem with that.

MR. TURLEY: Absolutely.

SENATOR McCASKILL: So the compelled testimony can be used to impeach his testimony if he takes the stand.

MR. TURLEY: I think impeachment rules are much, much broader. And I think we would have a much weaker argument in that sense. And I would like to address maybe two parts of your question.

First of all, your question alluded to the unique impeachment aspect. The thrust of our

argument is that you shouldn't do this. Whether you could do it is really not as important as you shouldn't do it. And because it's going to create a terrible precedent. And what we are trying to point out is that this is the worst case for it, because you are looking at a case involving appearance of impropriety.

And so if you Look at the Framers. What James Madison said is he said that the impeachment clauses were meant to try to guarantee that judges do not feel that they are -- I'm paraphrasing -- serving at the pleasure of the Senate. That is, it was meant to give notice to the judges as a defendant to say, you know, you are protected, you have life tenure, and the Senate can't just strip courts.

What this case would do in combination with the immunity is saying, you can be removed on appearance of impropriety. We can even go back 25 years when you were a state judge, and remove you for things you did as a state judge. And on top of that, even though you didn't get a criminal trial, we could wait until you are pulled into a disciplinary proceeding, compelled to testify, and then use that testimony against you.

What I would suggest is that that is exactly what Madison didn't want to happen. Imagine if you are a Federal judge reading the result of your order, and you that the Senate is proceeding to not only deal with pre-Federal conduct going back decades, but appearance issues as the basis of removal. And on top of that, they have the ability to wait for you to be forced to testify in a disciplinary matter on something like an appearance, and then use your testimony against you.

What we have said in this case is we may put on Judge Porteous at the trial. We haven't decided. To be honest, one of the great limitations is time. I have to, and my colleagues have to convince you that these allegations are untrue. We actually believe we can do that. We have very good witnesses lined up.

If we put Judge Porteous on the stand, it will eat a whole day of our time, but we have to make that calculus. That is a calculus that is often made. What we don't want is for compelled testimony to be used both in principle and in practice.

SENATOR KLOBUCHAR: Do you see a difference between using the testimony, which I

actually think is fine, and I know you don't agree, on then us compelling the judge to come before this panel. Do you see a difference, like do you think you have a stronger argument on the second one? And what is the difference?

MR. TURLEY: Well, Senator, I actually think they are both equally strong. I agree with you that there are differences. I can't imagine the Senate ordering an accused to appear and testify. I think that would shock the conscience of the bar, and it would shock the conscience of this institution. It has never been done before. But I also believe the use of immunized testimony in this way would equally shock the conscience.

If the House is ready to present their witnesses that our client did something that was removable, let them present the witnesses. What the House just said is, we want to present it from his own mouth. Why shouldn't you hear things from his own mouth? Well, that argument would gut the Fifth Amendment, why not argue that in all cases? Isn't it always better to hear evidence from somebody's own mouth? That's the point.

SENATOR RISCH: Mr. Turley, let me stop you just a second, so I can ask you a question. You

know, maybe you could direct your argument to the fact that we have in front of us an immunity that is crystal clear, as Senator Whitehouse pointed out, and as he read it to us.

Assume for a moment that this panel is not going to buy into the argument that the English language in this particular immunity is so clear that a common burglar could have understood it, let alone a district judge. Assume for a moment that we find that it is crystal clear and it applied only to use in a criminal proceeding, not in this proceeding.

Is it your argument that if we find against you on that, that we still should not allow this testimony to come in, and if so, how do you reach to that conclusion?

MR. TURLEY: Thank you, Senator. That is, in fact, our argument, that even if you conclude that you can do this, you should not do it. And when you say that even a burglar can understand this, Judge Porteous understood it, and even their witnesses say that he was a brilliant judge. He understood it. The question is, what did he understand?

As a criminal defense attorney, I would

understand a grant of immunity as defined by the Supreme Court in Lees that says it is not limited to criminal proceedings. It includes things that are criminal in nature. It includes things where your property is at stake. I would actually put this above any of those earlier cases like Lees. But putting aside that argument, the question still remains, what does this body do to that standard if it starts to force testimony -- immunized testimony to be used?

SENATOR RISCH: Well, if we find against you on that, and determine that this grant of immunity does not apply in this, it's gone, it's out the window, it's as if it did not exist. In which case, all we have is his testimony, forget about any immunization. Why shouldn't we be able to use that testimony, given those circumstances?

MR. TURLEY: Well, I would say, Senator, that even if you believe that the immunity agreement is not binding on the Senate, we talked today repeatedly about the question of fairness, that this body has always tried to be fair, and that that is reflected in the fact that of 14 judicial impeachments, you have declined to remove seven of those judges.

You have, in fact, repeatedly rejected the majority of articles presented by the House have been rejected. This body has created, in my view, an amazing record of fairness. I believe that this would be grossly unfair. The question is not whether --

SENATOR RISCH: Why is it unfair? If he got up and told the truth and laid out some facts, it seems to me it would be eminently fair to him and to us for us to consider his sworn testimony of the facts.

MR. TURLEY: Senator, what I would say is that one of the touchstones of our legal system, and the legal system that we inherited from England is that people should not be forced to give testimony against themselves. They should have that choice. They should have the choice of taking the stand and speaking as to their innocence or guilt. And it goes against that very core premise.

SENATOR WHITEHOUSE: So if he testified in a civil case under no immunity whatsoever, you would be here making that argument, you'd be saying, no, he was giving testimony against himself, you can't use it?

MR. TURLEY: No, Senator, if he gave

testimony in a formal proceeding, just like a trial

--

SENATOR WHITEHOUSE: And now we're back to the immunity. And we're back again to Senator Risch's question. You can't have it both ways.

MR. TURLEY: I would like to think I am not having it both ways, because what I view is one proceeding where he did not want to testify and was forced to testify, and one where he voluntarily went into a court of law, raised his hand, and gave testimony. I think there is a material difference, and there is a material difference in the law.

I mean, the Fifth Amendment is not just some type of defense trick or precious issue. It's a principle.

SENATOR McCASKILL: What about this, you've talked about the precedent and -- what about the message it sends to other judges? That all they have to do is get an immunity grant in front of a judicial proceeding, and then they can rest assured that nothing they say would ever be used to impeach them? What about that problem with public policy and the message that sends to other Federal judges?

MR. TURLEY: Madam Chair, what I would suggest is that it does not send a troubling

message, in the sense that the judges would be aware that they could be forced to testify in front of a judicial proceeding. And they would have to testify truthfully. They could still be prosecuted for perjury. This is not a get out of jail free card. You could be prosecuted for perjury if you lie under oath. What I would suggest --

SENATOR McCASKILL: Aren't they going to run to the judicial proceedings, request immunity, and then know they've got a get out of jail free card in terms of being impeached by the United States Senate?

MR. TURLEY: I don't know of any judges that are going to run to a disciplinary proceeding as a whole, but I have to say --

SENATOR McCASKILL: If they've engaged in conduct that they thought could be impeachable, I would see that they would. Couldn't they turn themselves in, and say, I want to come in front of the disciplinary committee of this circuit, and I would like them to give me immunity, because I believe that there is something that needs to be discussed. And they get immunity and at that point in time, based on the precedent that we might set here, that that information could never be used by

the United States Senate?

MR. TURLEY: I would submit that this case stands for the proposition that it doesn't protect you, in the sense, we are just debating about the use of the testimony. They went ahead and impeached him. He is still going to stand trial.

SENATOR McCASKILL: I understand, but it would be a way of keeping that -- his testimony out. If we don't compel him to testify, and we say that his prior testimony in front of the disciplinary committee can not be admitted, even though it was legally obtained, then haven't we set a precedent, a road map, if you will, for future judges to avoid what they say in front of the disciplinary committee ever being used against them in impeachment?

MR. TURLEY: I don't see the material advantage to that, but what I would say, Senator, is that the purpose of giving immunity in those proceedings is to say we are not here about criminally charging you. What we are here about is to find out what you did, and we are going to give you immunity. Now --

SENATOR McCASKILL: By the way, that's what we are here for, too.

MR. TURLEY: Yes, that's true, but that's

not -- that's not something that has happened a great deal, but I think that this body is materially different from a judicial disciplinary proceeding.

SENATOR KAUFMAN: How are they different?

MR. TURLEY: Well, because this body has the burden that was given to it by people like James Madison.

SENATOR KAUFMAN: But wasn't -- basically, we are facing the same -- do you see any problem with forcing him to give immunity for the judicial board that he's meeting before, do you see any problem with forcing him to testify and giving him immunity?

MR. TURLEY: I personally think that they should not force judges to testify.

SENATOR KAUFMAN: But -- so you would argue that that shouldn't happen either.

MR. TURLEY: Yes, but I don't question that they can do that. But the distinction I would draw, Senator, is that this body is not like -- the disciplinary panel is dealing with a judicial ethics code that changes every single year.

SENATOR KAUFMAN: No, I understand. But it's closer to -- it's not a criminal -- I think it's closer to that. I generally think it is closer

to that than it is to a criminal case. I mean, a criminal case, you are getting somebody off the street, you are grabbing them, and you're saying, we are going to take in and try you.

In this case, you have somebody who is working for you, doing a job, and you are going to see whether they are doing the job right. And based on that, you're going to make certain decisions. Isn't our job really much closer to that than it is to the job of a criminal case?

MR. TURLEY: Senator, I would say it is closer, as Lees indicates, to the types of criminal nature proceedings that was described in Lees, but there is one big difference, whether we treat it as criminal or criminal nature or civil, the cases may be analogous, but you are not. You are different. You have the added burden given to you by people like James Madison who told you, we don't want you to change the rules.

We don't want you to make it so easy to strip a court of a judge. And if you add the aggregation of claims plus the appearance of impropriety basis and you add to that, that you can use immunized testimony for the first time in this country's history, then you have --

SENATOR KAUFMAN: I have that. But aren't we really just like the Fifth Circuit committee, and what the Fifth Circuit committee was trying to get at, was he engaging in an argument that was -- he was engaging in something that was bad, should not be done, and isn't that what we are trying to do, too? I don't see this as being like a criminal case, I see this -- or a civil case. I see this as kind of like an employment case, where you have somebody working for you, and you are trying to figure out whether they are doing a good job or not.

And you ask them, okay, look, if you want to keep your job, you have got to come and testify and you got to submit to immunity, or you lose the job. And so it seems to me that is very different. Because when you first started, I was very concerned about the Fifth Amendment thing, but I don't think this is anywhere analogous -- not close to that. I think it's more a situation where we are is where the Fifth Circuit was.

MR. TURLEY: Well, obviously, I should have sat down at the beginning, but what would I argue that it's not like an employment case, in the sense that --

SENATOR KAUFMAN: Excuse me. It's like

the Fifth Circuit.

MR. TURLEY: What I would distinguish is that the Fifth Circuit's role and function was completed, the Fifth Circuit sanctioned him for an appearance of impropriety. He has been punished for the appearance of impropriety. He had been punished pretty heavily, and he admitted to it. And that was the function of it, but what is happening here is that same allegation is now being elevated to a removable offense.

SENATOR KAUFMAN: But they made a judgment. Their judgment was that he had done something wrong. Therefore, the process that they used to get there seems to be -- we just have the ability to make a higher sanction, but basically what we are trying to get at seems to me is very -- if not identical, very similar, and I really think it's much different than a criminal or civil --

SENATOR HATCH: Mr. Turley, let me just add to that. The Supreme Court has held that the privilege against self-incrimination does not extend to consequences of a noncriminal nature, including loss of employment. I think that's the Applebaum case. Judge Porteous faces only noncriminal consequences in this instance, which is limited to

loss of his office as a Federal judge. Now, why is that not enough to conclude that the privilege against self-incrimination does really not apply here?

MR. TURLEY: Senator Hatch, what I would suggest is two-fold. One is, we are not talking just about a higher sanction. You are not here just to impose tougher punishment.

SENATOR HATCH: Right.

MR. TURLEY: You are here to impose a higher standard, that's the constitutional standard with a unique function, and what would I would suggest about the view of the noncriminal nature of this proceeding --

SENATOR HATCH: But in your filings, you cite Supreme Court precedent that the Fifth Amendment applies in some civil proceedings, you cite the Lees cases, for example, which involved a civil penalty for violating an act of Congress, and in the Boyd case, involved civil forfeiture of a person's property. Now, aren't these very different than this case, which involves impeachment, where the sanctions are not personal, but they are official, limited to removal and possible disqualification from office.

MR. TURLEY: I would say that they are different, but I would say that this is more serious. What this body is thinking of doing is for only the eighth time in the history of this country removing a Federal judge and stripping him of his Article III powers.

SENATOR HATCH: We take our obligations very seriously here, and especially with regard to Federal judges. The House argues that the judicial impeachment proceeding is more like a judicial disciplinary proceeding than a civil forfeiture proceeding. Now, the events that brought us here today actually include such a judicial disciplinary proceeding before the Fifth Circuit. Now, how is a civil forfeiture proceeding a closer analogy to judicial impeachment than a judicial disciplinary proceeding?

MR. TURLEY: Well, first of all, what I would submit is that if you read the statements of James Madison during the Constitutional Convention, and if you can imagine putting yourself in Philadelphia and telling James Madison, isn't it basically like a judicial disciplinary proceeding, I expect, if you read his statements, the answer would be clear.

Judicial disciplinary proceedings deal with a whole range of everything from the minute to a very serious act of misconduct. And they have rules that reflect the fact that they have a broad spectrum of issues with different standards. What Madison and the Framers repeatedly emphasized is they don't want that type of fluidity to apply to Federal judges. What I would submit to you, Madam Chair, is that I am much more concerned about the message going to Federal judges.

SENATOR HATCH: Our Senate impeachment proceedings are very important to us. The Senate voted 92-1 to deny Judge Hastings' motion that the Fifth Amendment's double jeopardy clause applies to impeachment proceedings. Now, are you arguing that the Senate should come to a different conclusion about the self-incrimination clause than it did with regard to the double jeopardy clause?

MR. TURLEY: Yes, I am, Senator Hatch.

SENATOR HATCH: That's what --

MR. TURLEY: I think the double jeopardy clause argument was a bit of a stretch, quite frankly. I didn't really see the merits of that argument.

SENATOR HATCH: Well, I agree with that.

MR. TURLEY: I should quickly sit down, since we're in accord. But I would push it a little further, and that is to say that the difference between what we are arguing and what they argued is we are not just arguing that the Fifth Amendment binds you. We are arguing more that the privilege underneath the Fifth Amendment --

SENATOR HATCH: You're arguing about setting a principle that you think would be a bad principle.

MR. TURLEY: Yes, and that principle.

SENATOR HATCH: You're not really arguing that we can't do it.

MR. TURLEY: Well, we do argue that there is a position -- there is a question whether it should bind you. As you raised in the question, I don't believe the Fifth Amendment is a stranger to impeachment proceedings. But what I'm saying is that this body should first focus on the principle of the privilege that extends way beyond the history of this Republic. And I would suggest that that principle should motivate the outcome in this motion.

SENATOR McCASKILL: Thank you, Mr. Turley, and we will now hear the final rebuttal argument of

five minutes from the House manager.

REBUTTAL ARGUMENT OF CONGRESSMAN GOODLATTE

ON BEHALF OF THE UNITED STATES

HOUSE OF REPRESENTATIVES

CONGRESSMAN GOODLATTE: Thank you, Madam Chairman. First, let me say that with regard to Professor Turley's first argument that never has immunized testimony been admitted in impeachment cases before. Well, there is a reason for that. Never has it been requested to enter immunized impeachment. And I am aware of no impeachment process where this was ever even an issue.

Now, I think it's very important when we talk about principles and not establishing bad precedent that we honor the Fifth Amendment of the United States Constitution as the Fifth Circuit did.

SENATOR WICKER: Mr. Goodlatte?

CONGRESSMAN GOODLATTE: Yes, sir.

SENATOR WICKER: Could we require this judge to come forward and testify before these proceedings?

CONGRESSMAN GOODLATTE: I think you could, and I think that --

SENATOR WICKER: Do you think that would shock the conscience of the nation as Mr. Turley

suggested?

CONGRESSMAN GOODLATTE: No, particularly not if you gave him, again, immunity against criminal prosecution as the Fifth Amendment requires. This is not a criminal proceeding. This is a fact-finding activity to determine whether or not he should be removed from office. And then to make a recommendation to the full Senate which would then vote on that.

And you should have available all of the information just as the Fifth Circuit requires in their rules. It says all persons who are believed to have substantial information will be called at a special committee of witnesses, including the complainant and the subject judge. The witnesses may be questioned by the special committee or its counsel.

The subject judge will be afforded the opportunity to cross-examine committee witnesses personally or through counsel. That's the rule. It's not, you can choose whether or not you want to appear. They gave him immunity against criminal prosecution. They honored his Fifth Amendment right against testifying against himself in a criminal matter.

SENATOR KLOBUCHAR: Is there precedent, though, for us compelling someone. Has this happened before, where we have compelled a judge to appear before the Senate?

CONGRESSMAN GOODLATTE: The House has argued that both the House and the Senate have the right to compel various government witnesses to appear before Senate and House bodies. Not in an impeachment case like this, but in other cases, where the House and Senate have wanted to determine information that is of importance to them. And when they have done so, they have often granted immunity to the individual against criminal prosecution in the process of doing so.

SENATOR KLOBUCHAR: But they haven't compelled one of these judges to appear in an impeachment hearing like this?

CONGRESSMAN GOODLATTE: Not that I am aware of, Senator Klobuchar, but again, I think that it is something that you have an absolute right to do. And it certainly should relate to a situation where he was extended added benefits, not, you know, he was -- this was not a Star Chamber that took place at the Fifth Circuit special committee.

SENATOR KLOBUCHAR: But if we chose not to

compel him, let's just say we decided that we didn't need that, we had other evidence, it's not like we are setting a precedent that we can't.

CONGRESSMAN GOODLATTE: No, that's correct, but you also should admit this evidence. Now, I want to comment on another thing that Senator Johanns alluded to earlier. And that is the counsel for Judge Porteous keeps referring to this as just a case about the appearances of impropriety. And I like Senator Johanns and Senator Hatch and number of others of you have already sat through hours and hours and hours of testimony on this. And this case is about far, far more than just the appearance of impropriety. I won't go into the evidence today, but the evidence will reflect that.

But if you rule in favor of Judge Porteous on excluding his own testimony, depriving yourself of some of the most critical evidence here, you will also afford the judge the opportunity to refashion his arguments. In his testimony before the Fifth Circuit, he argued -- he acknowledged that markers used in gambling are debts.

In the argument that they have made before this Committee on one of their motions, they have begun to argue now that they are not debts. So the

fact of the matter is, his full record of his testimony should be available to you, to not only impeach his testimony, if he does testify, but also so that you have the full picture in his voice of what took place, and so that he is not allowed in this process to recast what he told the Fifth Circuit when they did indeed discipline him.

Now, when they disciplined him, it is not as Judge Shirley said, the end of the matter for the judiciary. It was sent up to the full Fifth Circuit, they then sent it to the Judicial Conference of the United States, which reviewed this very due process argument, and then forwarded the case to the House of Representatives for consideration of impeachment. That's the full role and that's the full panoply of remedies that the judiciary has in dealing with judges that they think have gone astray.

It's not just that he was reprimanded for an appearance of impropriety. They thought this should come all the way here. And I don't believe that when they sent that to the House of Representatives, when they delivered that package to Speaker Pelosi's office that they intended that the House could consider this, but the Senate could not.

I think that this is something that is very clearly within your jurisdiction, and I would urge you to admit this prior immunized testimony. And I thank you.

SENATOR McCASKILL: Anyone else? Okay. Thank you all very much. Let me make a couple of statements here on the record. First, as to this final -- we are going to go into a closed session now. And that is required by the rules. But I want to make sure that before we do that, I want to talk about this last motion hearing that we just had. You know, the Committee must vote on these immunity requests today in order to have it processed before the evidentiary hearing in September.

Having said that, this Committee will only act on a formal request in the record by any party. The House has indicated in their most recent filing, they may seek to call Judge Porteous. However, they are not formally requesting immunity for Judge Porteous.

It would appear that Judge Porteous's counsel wants immunity for Judge Porteous if he chooses to testify, even voluntarily, but they are not making a formal request of the Committee for immunity for Judge Porteous. Without a formal

request by either party, the Committee will not vote on those matters or make a decision in regard to those matters.

So if either party has a specific request they have, they need to make it formally as it relates to the granting of immunity or the not granting of immunity, as the case may be. But we will go ahead and rule today on the motions that are in front of us. Let me put the formal information in the record.

I would like to thank all of you for your time today and for your presentation. We will not issue our rulings today. We will deliberate and hopefully decide today. I think it is important that we try to get this done, since you all need certainty as you plan for the trial in September. The rules and practices of the Senate when sitting on impeachment trials require that the Senate, and in this case, the Committee go into closed session for purposes of deliberating on motions.

Therefore, I do hear a motion under the Senate impeachment rule 20, and rule 24, that the Committee go into closed session for the purpose of deliberation.

SENATOR KAUFMAN: Thank you.

SENATOR McCASKILL: Is there a second?

If there is not any discussion? If so, all in favor say, "Aye."

[Chorus of ayes.]

SENATOR McCASKILL: Opposed, nay? The ayes have it, the motion is agreed to. The Committee will now continue in closed session. At this time, we would request that everyone leave the room. We will take a brief break and be back in two minutes, while the Capitol Police clear the room.

[Whereupon, the instant proceedings were recessed at 3:35 p.m.]